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HEARING

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In the Matter of:

Adjustment of the Rates for  
Noncommercial Educational  
Broadcasting Compulsory  
License

Docket No. 96-6  
CARP NCBRA

Library of Congress  
James Madison Building  
101 Independence Avenue, S.E.  
Room LM414  
Washington, D.C. 20540

Tuesday,  
March 31, 1998

The above-entitled matter came on for  
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson  
THE HONORABLE EDWARD DREYFUS  
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

APPEARANCES:On Behalf of Broadcast Music, Inc.:

JOHN FELLAS, ESQ.  
NORMAN C. KLEINBERG, ESQ.  
MICHAEL E. SALZMAN, ESQ.  
of: Hughes, Hubbard & Reed, LLP  
One Battery Park Plaza  
New York, New York 10004-1482  
(212) 837-6075 (JF)  
6680 (NCK)  
6833 (MES)  
and

JOSEPH J. DiMONA, ESQ. (Asst. V.P.)  
MARVIN L. BERENSON, ESQ.  
Legal and Regulatory Affairs  
BMI  
320 West 57th Street  
New York, New York 10019-3790  
(212) 830-3847

On Behalf of ASCAP:

I. FRED KOENIGSBERG, ESQ.  
PHILIP H. SCHAEFFER, ESQ.  
J. CHRISTOPHER SHORE, ESQ.  
SAMUEL MOSENKIS, ESQ.  
of: White & Case, LLP  
1155 Avenue of the Americas  
New York, New York 10036-2787  
(212) 819-8740 (PHS)  
8394 (JCS)

BEVERLY A. WILLETT, ESQ.  
ASCAP Building  
Sixth Floor  
One Lincoln Plaza  
New York, New York 10023  
(212) 621-6289

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APPEARANCES (continued):On Behalf of ASCAP:

JOAN M. MCGIVERN, ESQ.  
Assistant Vice President of Legal  
Affairs  
Office of the CEO  
ASCAP  
One Lincoln Plaza  
New York, New York 10023  
(212) 621-6289

On Behalf of the Public Broadcasters:

R. BRUCE RICH, ESQ.  
JONATHAN T. WEISS, ESQ.  
MARK J. STEIN, ESQ.  
TRACEY I. BATT, ESQ.  
ELIZABETH FORMINARD, ESQ.  
of: Weil, Gotshal & Manges, LLP  
767 Fifth Avenue  
New York, New York 10153-0119  
(212) 310-8170 (RBR)  
8885 (JTW)  
8969 (MJS)  
8405 (TIB)

and

KATHLEEN COX, ESQ. (General Counsel)  
ROBERT M. WINTERINGHAM, ESQ. (Staff Atty)  
Corporation for Public Broadcasting  
901 E Street, N.W.  
Washington, D.C. 20004-2037  
(202) 879-9701 (KC)  
9707 (RMW)

and

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APPEARANCES (continued):On Behalf of the Public Broadcasters:

GREGORY FERENBACH, ESQ.,  
(Vice Pres. & Acting General Counsel)  
ANN W. ZEDD, ESQ. (Asst. Gen. Counsel)  
KAREN C. RINDNER, ESQ. (Asst. Gen.  
Counsel)

PBS  
1320 Braddock Place  
Alexandria, Virginia 22314  
(703) 739-5063 (GF)  
5170 (AWZ)

NEAL A. JACKSON, ESQ.  
DENISE B. LEARY, ESQ.  
GREGORY A. LEWIS, ESQ.  
Deputy General Counsel  
National Public Radio  
635 Massachusetts Avenue, N.W.  
Washington, D.C. 20001  
(202) 414-2000 (NPR)  
2049 (DBL)

ALSO PRESENT:

GINA GIUFFREDA, CARP Specialist  
TAMALA T. BOYD, Legal Assistant,  
White and Case  
ALBERT ALDERETE, Legal Assistant,  
Weil, Gotshal & Manges, LLP

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I-N-D-E-X

WITNESS

DIRECT

CROSS

REDIRECT

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M. Peter Downey

By Mr. Kleinberg 2223

By Mr. Rich 2285

2357

By Mr. Schaeffer 2322

Peter Jablow

By Mr. Rich 2360

By Mr. Schaeffer 2395

Voir Dire by Mr. Kleinberg on page 2486

Exhibit No.DescriptionMark RecdBMI

1X	Electronic Media 02-23-98	2240 2282
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2X	Broadcasting & Cable 09-01-97	2267	2284
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## PB

1            Cincinnati Inquirer 10-10-96            2298 2301

ASCAP

18X                  Current 03-02-98                  2322

19X                      Current 05-27-96                      2423

20X	NPR web site printout	2446 2247
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21X	Guidelines for Underwriting of National Program Service Programs	2455	2455
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22X PB Report 2460

312X 2476

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## COURT REPORTERS AND TRANSCRIBERS

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P-R-O-C-E-E-D-I-N-G-S

(10:02 a.m.)

CHAIRPERSON GRIFFITH: Mr. Downey, good morning.

WHEREUPON,

M. PETER DOWNEY

was recalled as a witness and, having been previously duly sworn, resumed the witness stand, was examined and testified as follows:

CHAIRPERSON GRIFFITH: Ladies and gentlemen, good morning. Let the record reflect that the Court Reporter has been previously sworn, and she remains under oath; that the witness, Mr. Downey, likewise has been previously sworn and remains under oath.

Are there any preliminary matters?

I trust all of you went to see the cherry blossoms last night.

All right. Mr. Kleinberg on behalf of BMI?

MR. KLEINBERG: Thank you, Your Honor. I probably have just several hours of questions about

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1 underwriting and the like.

2 (Laughter.)

3 CROSS EXAMINATION

4 BY MR. KLEINBERG:

5 Q No. Mr. Downey, I think I can assure you  
6 that I have taken the night to pare down what remained  
7 of any questions that hadn't been asked to a bare  
8 minimum. So it shouldn't be too much longer.

9 I do want to ask one question about the  
10 subject of corporate underwriting/advertisement, and  
11 it's more in the nature of a clarification, I hope.  
12 As I understand your testimony, there are national  
13 underwriting announcements that are distributed by PBS  
14 with the programming that is in the National Program  
15 Service collection, is that correct?

16 A That is correct.

17 Q And that goes to the member stations along  
18 with the program?

19 A That is correct.

20 Q In addition, is it also correct that the  
21 member stations themselves may add corporate  
22 underwriting announcements to that programming as well?

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1           A       They can't put it inside the program.  
2       They can't edit the program, but they can put it  
3       adjacent to the program.

4           Q       And so that the totality, if you will, of  
5       corporate underwriting announcements is really twofold  
6       with respect to the national program fee -- that is,  
7       those that are already incorporated in the program  
8       from PBS, and then whatever may be added in the way of  
9       adjacencies by the member stations themselves?

10          A       Yes. We have -- we have some rules here  
11       that are important to point out -- namely, that if a  
12       -- if PBS uses funds to acquire a program, which may  
13       also have funds from a corporate underwriter, then  
14       stations may obtain local underwriting for that  
15       program because their funds were invested in it.

16                 So a typical announcement might be the  
17       costs of this episode of Nova are made possible in our  
18       community by the XYZ company, and then the program  
19       itself contains whatever announcements were obtained  
20       by -- or credits for whatever underwriting was  
21       obtained by WGBH.

22          Q       And, in fact, this occurs with respect to

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1 a national feed -- that is, that you have the  
2 combination, if you will, of national underwriting and  
3 local underwriting, with respect to some of the  
4 programming, isn't that correct?

5 A There is actually very few programs that  
6 are fully underwritten. That is to say, most programs  
7 have some station money via PBS in them which enables  
8 local underwriting messages, and so the answer is yes.

9 Q And I believe it's correct from -- that I  
10 understand your testimony -- that the guidelines that  
11 you were talking about yesterday were mandatory with  
12 respect to the national underwriting that occurred as  
13 part of the feed but was precatory or optional with  
14 respect to the adjacencies that -- of underwriting  
15 announcements that the local stations might put in  
16 themselves?

17 A That is correct, recalling, of course,  
18 that the stations are also regulated by the FCC.

19 Q Correct. I think we all understand that  
20 there is the FCC out there as well.

21 And you also testified yesterday that the  
22 member stations made payments to PBS at two levels or

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1 at two different kinds of payments. One was the  
2 member service assessment, and the other was the  
3 National Program Service assessment or fee, is that  
4 correct?

5 A There are some others that are, you know,  
6 de minimus by comparison. Those are the two main  
7 program assessments.

8 Q And --

9 A Or assessments.

10 Q And the member service assessment is for  
11 purposes of reimbursing or paying PBS for its  
12 administrative functions in terms of providing the  
13 satellite, and things like that?

14 A That is correct.

15 Q What's the basis on which the member  
16 stations are charged for that member service  
17 assessment?

18 A There are two different formulae, one for  
19 the member service assessment and one for the program  
20 assessment. The member service assessment is  
21 allocated -- or the total PBS budget is allocated to  
22 stations on the basis of each station's Community

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1 Service Grant factor.

2 Do you care to know more about this?

3 Q Yes, I do, actually.

4 A Okay. Each station, in the course of a  
5 year, raises some amount of non-federal financial  
6 support, acronym NFFS. At the end of the year, CPB,  
7 in the course of gathering all of its financial  
8 information from stations, adds up the total NFFS  
9 raised by all of the stations. And let's say it's a  
10 hundred dollars, and let's say a particular station's  
11 NFFS was one dollar. So that station's NFFS would be  
12 one percent of the total amount raised by all  
13 stations.

14 Now CPB distributes the federal support in  
15 two pieces -- what's called a base grant, which  
16 presently I believe is about \$275,000, and then all of  
17 the rest of the funds are distributed in proportion to  
18 NFFS. So our hypothetical station gets one percent of  
19 whatever that pool is.

20 Now, we use that same factor at PBS, that  
21 one percent factor, to allocate the costs of our staff  
22 and administration and operations. So, in fact, WNET

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1 in New York, their factor is about four and a half  
2 percent, WGBH's is around two and a half. The median  
3 factor is .07 -- sorry, seven-tenths of one percent.

4 So when you add up all those factors, it  
5 adds to 100 percent, and that's how we allocate that  
6 cost.

7 Q So is it fair to say that those member  
8 service assessments relate in terms of the size of the  
9 income or the revenues that have been raised by the  
10 member stations themselves?

11 A Those factors are essentially a proxy for  
12 ability to pay.

13 Q Ability to pay. Okay.

14 And as you indicated, those stations that  
15 have greater resources, greater income, and the like,  
16 such as WNET or WGBH, pay more in terms of the member  
17 service assessment than the smaller --

18 A That is correct.

19 Q -- stations. Okay.

20 Now, the other assessment, the National  
21 Program Service assessment, that's for the payment for  
22 actually getting access to the programming, is that

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1 correct?

2 A That supplies the budget to the Chief  
3 Program Executive at PBS. There are no staff costs in  
4 that. It's pure program budget dollars.

5 Q And what's the basis for the assessment  
6 calculation for the member stations for the  
7 programming?

8 A It's a more complicated formula which was  
9 complicated to achieve an objective of leveling the  
10 playing field so the costs were more evenly  
11 distributed. But it involves the same factor I  
12 described a moment ago -- CSG factor. But added into  
13 it are each station's -- one piece of it is station's  
14 -- what's -- so-called adjusted budget.

15 So we -- if one station has -- if all of  
16 the stations' budgets are a hundred dollars, and one  
17 station's operating budget is a dollar, then that's a  
18 one percent factor. The adjustments take into account  
19 the number of transmitters the station has. There is  
20 -- we deduct \$150,000 for each transmitter from their  
21 budget. We also deduct amounts provided to the  
22 station by PBS for national programming, so that a

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1 WGBH or a WNET isn't penalized for being a producer of  
2 programs for PBS. So we weigh up all those budgets.

3 And then the third factor is population.  
4 I believe 20 percent -- it's a 20 percent weighting,  
5 so that at the end of the day stations in very large  
6 markets, like New York or Los Angeles, are paying  
7 somewhat more because of the large population they  
8 serve. And, conversely, small stations like KEET in  
9 Eureka, California, are not paying more because they  
10 serve a very small population.

11 Q And the population relates to the audience  
12 size that that particular station might be able to  
13 attract in those --

14 A It's --

15 Q -- markets?

16 A It's the grade A population according to  
17 the Census. So it's the number of persons, not TV  
18 households, not viewers, but persons who live in the  
19 grade A circle that the transmitter covers.

20 Q And you said grade A circle?

21 A Sorry. The -- when signals are radiated  
22 by a television transmitter, there is a -- a technical

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1 measure of signal strength. And at a particular --  
2 wherever the -- however far out that signal reaches at  
3 that strength is deemed to be the grade A coverage of  
4 the -- of that particular station. It averages 30 to  
5 40, 45 miles radius from the transmitter.

6 Q And so the range of the transmitter is  
7 defining the area in which this population might  
8 receive the signal that the member station is  
9 broadcasting?

10 A Correct. It's roughly analogous to the --  
11 what's called either the DMA, designated market area,  
12 which is a proprietary term used by Nielsen, or ADI,  
13 area of dominant influence, which is a proprietary  
14 term used by Arbitron. But it's essentially the area  
15 the station reaches.

16 Q And those last terms that you referred to,  
17 those are terms and points of reference that are used  
18 in the commercial broadcasting field -- indeed, in  
19 broadcasting in general, aren't they, to define the  
20 reach of broadcasting stations --

21 A Yes.

22 Q -- with respect to population?

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1 A Yes.

2 Q Now, it is correct, is it not, Mr. Downey,  
3 that the public television stations compete for the  
4 viewers with commercial television, both cable and  
5 network?

6 A It depends on the sense in which you mean  
7 that. If -- public broadcasters don't get up every  
8 morning and say to themselves, "How can I beat the NBC  
9 affiliate here in town?" We present the best programs  
10 we're capable of acquiring or producing, and we hope  
11 -- and we promote them as aggressively as we can, and  
12 we hope a lot of people watch.

13 Now, if that's competition, so be it.  
14 There's only so many viewers, and the pie has to get  
15 cut somehow. But we do not think of ourselves as  
16 being in head-to-head competition with the commercial  
17 networks.

18 Q Well, would you agree with the statement  
19 that a public television station competes for viewers  
20 with commercial television, DBS, cable TV, and on-line  
21 services, as well as a wide range of other options?

22 A Obviously, we are -- you know, viewers

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1 have many things they can do when it's time to watch  
2 TV, and there are lots of stations they can watch. So  
3 sure, we're competing in the sense of hoping that our  
4 programs attract, you know, lots of viewers. But,  
5 again, our success or failure is not measured in terms  
6 of whether we have the same ratings as NBC or ABC or  
7 -- that's really not the objective.

8 Q Well, your success is defined, though, by  
9 the fact that you have been able -- and by "you" I  
10 mean, public broadcasting and public television -- has  
11 been able to maintain its viewer share over the last  
12 few years as we saw yesterday in the annual report  
13 that Mr. Duggan was trumpeting, isn't that correct?  
14 That was a measure of success?

15 A We have managed to maintain our average  
16 rating and share, yes.

17 Q And that was in the face of a declining  
18 share of viewership by the commercial broadcasters?

19 A That is correct.

20 Q And that was something that public  
21 television was quite proud of, correct?

22 A We're delighted to be here, yes.

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1 Q And you weren't hiding the fact that you  
2 were maintaining the prime time market share vis-a-vis  
3 the commercial broadcasters, correct?

4 A No, not hiding it. No.

5 Q In fact, you were proud of it, weren't  
6 you?

7 A Yes. Again, we're proud of the programs  
8 that we produce or, you know, have produced, and we're  
9 proud to present them, and we're delighted, you know,  
10 when people watch them and respond to them with  
11 voluntary contributions, for example. That's the  
12 business we're in, but it's a different business from  
13 saying, "I want the largest share of audience I can  
14 possibly get, and I'm willing to put on whatever  
15 program it takes to achieve that."

16 Q My question was whether -- I started this  
17 series of questions, whether public television  
18 stations compete with commercial television for  
19 viewers. And I think your answer to that is yes, we  
20 do compete for viewers, correct?

21 A We do compete for viewers.

22 Q And the way you compete for viewers is

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1 through the programming that you offer, correct?

2 A Yes, and the promotion and advertising.

3 Q But the way you get viewers is to offer  
4 programs that the viewers can watch, right?

5 A Yes.

6 Q And the diversity of the programming that  
7 you offer is, I take it from your testimony yesterday,  
8 the reason why you have been able -- and "you," again  
9 public broadcasting -- has been able to maintain its  
10 share because of the diversity, isn't that correct?

11 A We -- we pride ourselves on providing a  
12 diverse schedule. And, for example, in the course of  
13 a month, approximately 80 percent of all U.S. TV  
14 households will tune to PBS. But the average rating  
15 for any program is only two percent.

16 And so what that suggests, if you think  
17 about it, is a tremendous amount of churn or a lot of  
18 different people coming to different programs over the  
19 course of time, rather than, you know, one or two  
20 programs which attract the entire audience. And that  
21 is a hallmark of the service we provide -- a highly  
22 diverse service that appeals to different people

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1 because it presents different subjects intended for  
2 different audiences.

3 Q And how do you know that?

4 A Those are Nielsen data.

5 Q And that's something that, I take it, PBS  
6 follows or someone or somebody at PBS follows that  
7 kind of data?

8 A It's all there is. It's the only way to  
9 know, you know, who -- it's a matter -- it's a way of  
10 counting the house. We are proud of what we do, and  
11 we use public funds to do it. And if we spent a lot  
12 of money on a program and nobody tuned in, that would  
13 be an important message that we'd want to know. And  
14 so we do gather and collect -- we are subscribers to  
15 Nielsen and get their information.

16 It's a system that is designed for another  
17 purpose, but it's -- again, it's the best there is,  
18 because it's all there is.

19 Q And this counting the house is a practice  
20 that goes on constantly at PBS?

21 A I'm trying to -- yes. No, it doesn't. We  
22 get -- there are two different kinds of -- or there

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1 are many different kinds of Nielsen data. There are  
2 so-called overnights, which -- which involve meters in  
3 I think about 48 markets, and we get that data daily.  
4 But national data we only get for, I believe, a week  
5 a month times 10, or 10 weeks a year. So we don't get  
6 all of the data there is, but we get enough to -- to  
7 satisfy our -- you know, our needs.

8 Q Is there a special department or group  
9 within PBS that -- whose function deals with keeping  
10 up with the Nielsen rating results?

11 A Yes. We have a PBS research department.

12 Q And where is that located?

13 A At PBS headquarters.

14 Q And who is in charge of that?

15 A A gentleman by the name of John Fuller.

16 Q And are the fruits of that activity  
17 provided to the member stations as well?

18 A No. Well, some top-line, you know,  
19 summary data gets into speeches, as you have probably  
20 seen in the materials you've collected. But the bulk  
21 of the data are regarded as proprietary, and each  
22 station -- or a station has to individually subscribe

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1 to Nielsen in order to have access to that data on a  
2 regular basis.

3 Q And the individual stations, in fact,  
4 generally do subscribe to --

5 A Most -- most do.

6 Q So they get data on a station basis  
7 themselves, and PBS gets it itself through the  
8 department that you described --

9 A Yes.

10 Q -- the research department, correct?

11 A Correct.

12 Q Does this research department also  
13 commission studies with respect to ratings and  
14 viewership?

15 A Not very often. Maybe one or two a year.

16 Q Now, focusing on the last two years --  
17 1996 and 1997 -- would you agree with me, Mr. Downey,  
18 that as reflected in the annual report that you were  
19 questioned about yesterday, that PBS has embarked upon  
20 a new and different strategy with respect to the  
21 future in terms of maintaining its position as the  
22 leading proponent of quality television in the country?

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1           A       I think it's a difference of degree rather  
2           than kind. But we have worked harder than -- than in  
3           the past to establish relationships with media  
4           partners.

5           Q       And as a result of the initiatives that  
6           are described in the annual report that you were  
7           questioned about yesterday, and statements by Mr.  
8           Duggan, is it, in fact, correct that PBS has had an  
9           extraordinary and unprecedented period of growth and  
10          ratings success in the last two years?

11          A       We've had -- I'm not sure I ought to use  
12          the word "extraordinary," but we have certainly --  
13          financial growth in the last couple of years has  
14          exceeded prior years. That is not the case with  
15          audience growth.

16          Q       Do you know an individual by the name of  
17          Tom Epstein?

18          A       Yes.

19          Q       Who is Mr. Epstein?

20          A       Mr. Epstein is in charge of communications  
21          for PBS, public information.

22          Q       I want to show you yet another article,

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1 not from Current though, and ask you to take a look at  
2 that. It's an article from Electronic Media dated  
3 February 23, 1998.

4 MR. KLEINBERG: I wouldn't leave you out,  
5 Mr. Schaeffer, of anyone.

6 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do  
7 you want this marked now?

8 MR. KLEINBERG: Yes, I would.

9 CHAIRPERSON GRIFFITH: Okay. All right.  
10 BMI Exhibit 1X.

11 (Whereupon, the above-referred  
12 to document was marked as BMI  
13 Exhibit No. 1X for  
14 identification.)

15 MR. KLEINBERG: We previously marked, in  
16 connection with the direct case, some exhibits. I  
17 don't know whether we do a new numbering system now  
18 that we're on cross, so --

19 CHAIRPERSON GRIFFITH: Yes, BMI 1X.

20 MR. KLEINBERG: 1X, okay.

21 CHAIRPERSON GRIFFITH: Yes. That tells us  
22 it's cross exam.

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1 MR. KLEINBERG: Yes. Okay.

2 BY MR. KLEINBERG:

3 Q Mr. Downey, I wanted to refer you to the  
4 third column. You're free to, of course, take a look  
5 at the rest of the document, which has to do with  
6 apparently some dispute Congress and PBS have been  
7 having over the question of bonuses that were paid in  
8 the last couple of years to PBS executives.

9 But you would see in that third column in  
10 the second paragraph the following quote. "But Tom  
11 Epstein, a PBS spokesman, said more bonuses than usual  
12 were handed out in the last two years because the  
13 network had an 'extraordinary and unprecedented'  
14 period of growth and ratings success." Do you see  
15 that?

16 A Yes.

17 Q Would you agree with Mr. Epstein's  
18 supposed quote here -- and this is from an article --  
19 that the public broadcasting network had had an  
20 extraordinary and unprecedented period of growth and  
21 ratings success in 1996 and 1997?

22 A Well, I can only repeat what I said a

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1 moment ago. There has been substantial growth  
2 financially. There hasn't been substantial growth in  
3 ratings, although that -- that doesn't necessarily  
4 imply growth in this -- in this particular context.  
5 Ratings success could be holding our own in the face  
6 of other erosion with respect to the networks.

7 Q Well, in fact, isn't that the success that  
8 PBS has been telling the world with its annual report  
9 and Congress, with respect to the letter that we saw  
10 yesterday -- that is, look how well we have done at  
11 public television? While commercial television have  
12 lost market share, we have remained steady. Is that  
13 --

14 A That's what we've been saying. Sorry.  
15 The implication of your question was -- was to put a  
16 different interpretation on this.

17 Q And that ratings success was what Mr.  
18 Epstein described as being extraordinary and  
19 unprecedented in the last two years, correct?

20 A Well --

21 MR. RICH: Objection. He can only -- the  
22 witness can only answer to his knowledge what Mr.

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1 Epstein had in mind.

2 MR. KLEINBERG: Absolutely.

3 CHAIRPERSON GRIFFITH: Okay. Do you know  
4 personally?

5 THE WITNESS: I have no idea personally.  
6 All I can -- again, what I can say is that we -- our  
7 ratings have remained essentially flat for the last  
8 five years. In some levels, that's a success, because  
9 the three commercial networks -- ratings have been  
10 going down. But basic cable ratings have been going  
11 up.

12 Now, is that extraordinary and  
13 unprecedented success? Not in my mind, frankly. You  
14 know, I can't attach those adjectives to that reality.  
15 I don't know what Epstein meant. I'm delighted and  
16 proud that we've been able to hold -- hold flat, you  
17 know, given what's happening to others.

18 BY MR. KLEINBERG:

19 Q Well, in fact, you have increased ratings,  
20 for example, in daytime programming in the last two  
21 years, isn't that correct?

22 A That is correct.

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1 Q And you recall that the annual report for  
2 1997 said that there was double digit increases in the  
3 daytime programming?

4 A I'm sorry. I was referring to prime time  
5 or evening broadcasting.

6 Q And, in fact, the daytime double digit  
7 increases were 18 percent for children -- make sure I  
8 get this correct so -- page 13 of the annual report,  
9 which is ASCAP Exhibit 14X in front of you -- I don't  
10 know if the Panel has theirs from yesterday or not.

11 And in the paragraph under the heading, "A  
12 Neighborhood Where Children Count," the last sentence  
13 reads, "Against commercial television's better  
14 financed and more highly promoted competition, PBS  
15 daytime viewing grew a remarkable 18 percent among  
16 children ages 2 to 5, and 29 percent among youngsters  
17 6 to 11." Do you see that?

18 A Yes.

19 Q Do you agree or disagree with the  
20 description that that was -- that growth was  
21 "remarkable"?

22 A I agree.

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1 Q Would you agree that that was  
2 unprecedented in the time period of 1996/1997, in  
3 terms of PBS' history?

4 A I don't -- I don't know if it's  
5 unprecedented or not, but it certainly is substantial.

6 Q Now, you were questioned yesterday, or you  
7 did testify yesterday -- and I have the benefit of the  
8 transcript, actually -- at page 2153, you said, at  
9 line 21, "There is an increase in the federal  
10 appropriation, but some of these, you know, sources  
11 have been decreasing, in particular support from  
12 corporations." Do you recall that --

13 A Yes.

14 Q -- testimony yesterday? Isn't it, in  
15 fact, the case that corporate support, meaning  
16 corporate underwriting, has shown an increase or is  
17 projected to increase five percent this year?

18 MR. RICH: Objection. I think it's a  
19 compound question. Has shown or projected to show --  
20 is there --

21 MR. KLEINBERG: Projected.

22 CHAIRPERSON GRIFFITH: The objection is

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1 sustained.

2 MR. KLEINBERG: I will amend the question  
3 to a projection.

4 THE WITNESS: I'm sorry. Could you repeat  
5 the question?

6 BY MR. KLEINBERG:

7 Q I said isn't it, in fact, the case that  
8 PBS has projected a five percent increase in corporate  
9 underwriting this year -- that is, 1998?

10 A I don't know. We may have. I'm not aware  
11 of that.

12 Q Take a look at Exhibit 8X in the stack in  
13 front of you, which is -- 8X, which is an article from  
14 Current dated January 19, 1998. It's entitled "Press  
15 Tour Notes, Wishbone Finds Underwriters." What I'm  
16 referring to, Mr. Downey, is the third column, the  
17 last sentence before the phrase "Yes, Jane Tennyson  
18 may return."

19 There appears the following statement in  
20 reference to remarks supposedly made by Mr. Duggan.  
21 "Launched by PBS and four producing stations in July,  
22 the group -- that is, the PBS Sponsorship Group -- has

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1 brought in a total of \$11.5 million in corporate  
2 support in its first six months. Based on these  
3 results, Duggan projected a five percent increase in  
4 corporate underwriting this year." Do you see that?

5 A Yes.

6 Q Were you unaware of that projection by Mr.  
7 Duggan?

8 A Yes. I am also -- it's -- the story is  
9 ambiguous. I'm not clear whether his five percent  
10 projection has to do with -- well, first, it does seem  
11 limited to corporate underwriting for PBS national  
12 programs, and that presently is around 75 million. So  
13 five percent of that would be three and a half  
14 million, or some -- some order like that.

15 But it may also be that his five percent  
16 is in reference to the goal of the PBS Sponsorship  
17 Group, which raised \$11-1/2 million. So five percent  
18 of that would be \$600,000 or something. So at the end  
19 of -- bottom line, I'm not sure what he is referring  
20 to.

21 Q But your belief was that PBS corporate  
22 underwriting was on the decline, is that correct?

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1           A       I believe that's correct. I could refer  
2 to some notes, but I am -- I am confident in saying  
3 there has been no material change in the level of  
4 corporate underwriting for PBS national programming in  
5 recent years.

6           Q       Well, there is no change, or there is a  
7 decrease?

8           A       Well, I'd have to refer to some notes, if  
9 I may.

10          Q       Well, your testimony yesterday, which I  
11 read to you, said, "Sources have been decreasing, in  
12 particular support from corporations."

13          A       I'm reflecting on one of the exhibits that  
14 shows corporate support declining. I'm not able to  
15 put my finger on it just yet. If you'd like, I will  
16 try to find it.

17          Q       Please.

18                 CHAIRPERSON GRIFFITH: I'm going to run  
19 and get my exhibits. I left them on my desk.

20                 JUDGE DREYFUS: Just for clarification,  
21 the sentence that you read says, "Sources are  
22 decreasing." Does that mean the percentage of

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1 underwriting is decreasing or the number of  
2 underwriters is decreasing? Should we ask the witness  
3 to clarify that sentence, or --

4 MR. KLEINBERG: It's --

5 JUDGE DREYFUS: -- is it clear from the  
6 other testimony?

7 MR. KLEINBERG: It says, "Sources have  
8 been decreasing, in particular support from  
9 corporations." I understood that to mean the dollars  
10 coming from corporate sources were decreasing. But  
11 let's ask the witness whether that's what he meant or  
12 not.

13 THE WITNESS: I'm sorry. I was searching  
14 for this exhibit now. What was your question?

15 BY MR. KLEINBERG:

16 Q My question is, when you testified  
17 yesterday that sources have been decreasing, in  
18 particular support from corporations, were you stating  
19 that the amount of dollars received or to be received  
20 from corporate underwriters was decreasing in absolute  
21 dollars?

22 A Yes. I was referring to our Exhibit PB 4,

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1 which is part of my testimony on page 13.

2 Q Yes.

3 A And if you see in the second -- this is a  
4 bar -- a bar chart. And you see in the second block  
5 labeled "Business" that the amount has been decreasing  
6 over the period '92 to '96.

7 Q Which page?

8 A Page 13 of my testimony.

9 JUDGE DREYFUS: Oh, of your testimony.

10 BY MR. KLEINBERG:

11 Q Well, that chart talks about the  
12 percentage of annual revenues rather than the actual  
13 dollars, does it not, Mr. Downey?

14 A You're correct. But I -- having now  
15 refreshed my memory, I can say that the amount of  
16 corporate underwriting for PBS programs has been  
17 declining over the past -- since fiscal '93. I'm  
18 sorry, '95, since fiscal '95.

19 Q Are you talking about the share out of the  
20 total, or the --

21 A No. I'm talking about --

22 Q -- amount of dollars?

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1 A Absolute dollars.

2 Q And what are you looking at to reach that  
3 conclusion?

4 A Data that reports the total amount of --  
5 the total value of the PBS National Program Service.

6 Q Are you talking about donated broadcast  
7 rights?

8 A No.

9 Q Well, what are --

10 A What I'm talking -- excuse me. I'm  
11 talking about corporate underwriting.

12 Q Okay. And what are you looking at, if  
13 you're looking at anything, to -- when you're talking  
14 about this?

15 A I don't know if this has been submitted or  
16 not, but it's --

17 MR. RICH: May I take --

18 MR. KLEINBERG: Well, I don't know. We  
19 don't have copies of this.

20 BY MR. KLEINBERG:

21 Q Let me just ask this question to you.

22 JUDGE GULIN: Let me just throw out one

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1 thing.

2 MR. KLEINBERG: Yes.

3 JUDGE GULIN: In Exhibit -- Public  
4 Broadcasting Exhibit 4 that you alluded to a moment  
5 ago, Mr. Downey, would you take a look at the public  
6 broadcasting revenue by source, FY96. Now, the  
7 figures that are -- do you have that?

8 THE WITNESS: Does it look like this?

9 JUDGE GULIN: That's right. Table 2.

10 THE WITNESS: Yes.

11 JUDGE GULIN: Now, the public broadcasting  
12 revenues under television system, that's for -- that  
13 includes the local stations, correct? That's not just  
14 public -- that's not just PBS.

15 THE WITNESS: That's correct. These are  
16 station --

17 JUDGE GULIN: Okay. And in the  
18 conversation you're having right now, we're talking  
19 about just PBS --

20 THE WITNESS: Yes.

21 JUDGE GULIN: -- underwriting? Okay. So  
22 these figures would be of no use to you, then. Can

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1 you come to any conclusions based upon these --

2 THE WITNESS: No.

3 JUDGE GULIN: Okay.

4 BY MR. KLEINBERG:

5 Q So to round this out, going back to where  
6 we started, you don't know what or whether Mr. Duggan  
7 projected a five percent increase in corporate  
8 underwriting this year for PBS as reflected in ASCAP  
9 Exhibit 8X, is that fair, Mr. Downey?

10 A I was not aware he made that projection,  
11 no.

12 Q Now, I mentioned to you before the term  
13 "donated broadcast rights," which I don't think is a  
14 term that we've heard before. That reflects the value  
15 of programming that has been underwritten by corporate  
16 sponsors, does it not?

17 A Yes.

18 Q And that is an amount that's reflected in  
19 the financial statements of PBS?

20 A That is correct.

21 Q And is it not, in fact, correct that the  
22 donated broadcast rights have increased in value from

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1 1996 to 1997, from \$139 million in 1996 to  
2 \$142 million in 1997? And I refer you to the annual  
3 report and page 21 thereof, which is the consolidated  
4 statement of activity.

5 A I believe those are our certified  
6 financials, and I will accept that as a truthful  
7 statement.

8 Q And that reflects corporate underwriting,  
9 does it not?

10 A I'm trying to recall. There's a technical  
11 definition of donated broadcast rights that involves  
12 the FASB, and I remember reading -- I'm sorry --  
13 meeting with the auditors over that very data, and  
14 having long and inconclusive debates about what should  
15 or shouldn't be included. What is there was --  
16 represents the best of our ability to try to comply  
17 with the regulations, the FASB standards.

18 I'm hesitant to say yes, absolutely, it --  
19 it equals corporate underwriter. It may include  
20 foundation and government, for example, sources that  
21 also contribute donated program rights.

22 What I can say is that it represents the

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1 value of programs contributed to PBS where the cash to  
2 produce those programs did not flow through PBS'  
3 books.

4 Q Do not flow through PBS' books?

5 A Do not flow through our books. So when  
6 WGBH delivers Masterpiece Theatre, which Mobil  
7 underwrites, we get a videotape and we broadcast it or  
8 put it on the -- on the satellite to the stations, and  
9 we make a -- you know, we carry the value of that  
10 donation in this number called contributed or donated  
11 program rights. But, again, I can't assure you that  
12 it equates solely to corporate contributions.

13 Q Now, you state at page 21 of your written  
14 testimony that there has been a "significant decline"  
15 in cultural programming. Do you recall that  
16 testimony, sir?

17 A Yes.

18 Q And you would agree with me that according  
19 to your written testimony, as of 1994, there were  
20 still -- there was still 16 percent of PBS' broadcast  
21 hours relating to cultural programming, correct?

22 A Yes.

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1 Q And you would agree with me also, would  
2 you not, that that amount of cultural programming is  
3 far more than cultural programming that appears on  
4 commercial television?

5 A I couldn't say. I have no idea.

6 Q Well, how about if I focused in on  
7 commercial broadcasting television. Would you agree  
8 that commercial television broadcasting does not have  
9 16 percent of its total broadcasting hours directed to  
10 cultural programming?

11 A Assuming the same definition PBS uses, I  
12 would agree with you.

13 Q And cultural programming, within the PBS  
14 lexicon, includes things like Masterpiece Theatre,  
15 Great Performances, Evening at the POPS, those types  
16 of programs?

17 A I believe that would be found in that  
18 cultural programming, yes.

19 Q And would you agree --

20 A I'm sorry. Could you tell me where to  
21 look?

22 Q Page 21 of your written testimony. And

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1 I'm --

2 CHAIRPERSON GRIFFITH: Mr. Kleinberg,  
3 let --

4 MR. KLEINBERG: Yes?

5 CHAIRPERSON GRIFFITH: -- me just  
6 interrupt one thing. I'm one step behind you. On the  
7 donated broadcast rights, there's a footnote --  
8 note 7 --

9 MR. KLEINBERG: Yes. I was just going to  
10 go back to that myself, Your Honor, having --

11 CHAIRPERSON GRIFFITH: Well, go ahead,  
12 then. I won't --

13 BY MR. KLEINBERG:

14 Q Well, I wanted to direct your attention,  
15 Mr. Downey, to footnote 7, which appears on page 25,  
16 in which the subject matter of donated broadcast  
17 rights is referred to. And it states as follows,  
18 "Donated broadcast rights are administered by PBS for  
19 distribution to television stations through its  
20 national programming services. Donated broadcast  
21 rights are valued at the total amount of underwritten  
22 funds provided for a particular production." Does

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1       that --

2                   MR. RICH:    Could he give the witness a  
3       chance, again, to --

4                   MR. KLEINBERG:   Oh, I'm sorry.

5                   MR. RICH:    He's got a lot of documents  
6       he's shuffling, and --

7                   MR. KLEINBERG:   The annual report --

8                   THE WITNESS:   I know what I'm looking for.  
9       I just haven't found it yet.

10                  MR. RICH:    What page is it?

11                  MR. KLEINBERG:   Page 25.

12                  THE WITNESS:   Yeah.   I still don't -- I  
13       can't tell you because I -- either I don't know or  
14       I've forgotten whether that's exclusively corporate or  
15       whether foundation or federal association, other  
16       underwriting grants, would be captured in this -- in  
17       this category.

18                  BY MR. KLEINBERG:

19                  Q       Is it a typical reference to "underwritten  
20       funds" to refer to government sources?

21                  A       That would refer to all underwriting,  
22       which comes from numerous sources, including corporate

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1 but also including stations, producers, Federal  
2 Government, associations, private individuals, and  
3 others.

4 Q Okay. Going back, again, to the cultural  
5 programming. Is it, in fact, the case, Mr. Downey,  
6 that cultural programming continues to constitute a  
7 large portion of pledge drive schedules?

8 A There is a -- I couldn't tell you a  
9 percentage, but there is a fair amount of cultural  
10 programming in pledge drive schedules.

11 Q Well, naturally, I'm able to find some  
12 document that has some numbers on it, so why don't we  
13 add some more to the record. Let's take a look at PBX  
14 -- or PB Exhibit 3 in the binder. Now I can't find  
15 it.

16 MR. KLEINBERG: Page 10. Thank you, Ms.  
17 McGivern.

18 BY MR. KLEINBERG:

19 Q Under the category of "Pledge Programming"  
20 -- first of all, let's identify this document which  
21 was part of the exhibits I think referred to by Public  
22 Broadcasting in their written testimony. These are

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1 research notes prepared by the Corporation on Public  
2 Broadcasting?

3 A Yes.

4 Q And deals with the subject matter of 20  
5 years of public television programming highlights of  
6 the 1994 CPB programming survey?

7 A Yes.

8 Q Directing your attention to page 10 of  
9 this document, does that page refresh your  
10 recollection as to the amount of pledge day schedules  
11 that were of the cultural genre?

12 A I don't see cultural per se. I see  
13 programs that might -- or categories that might fit  
14 into.

15 Q Do you see the paragraph that reads, "Of  
16 course, the most significant difference from pledge  
17 and non-pledge period comparisons came from a single  
18 program subgenre -- music/dance performance"?

19 A Yes.

20 Q "During non-pledge periods, this program  
21 type was 4.4 percent of the schedule. But on pledge  
22 days, the category shot up to 11.1 percent"?

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1 A Yes.

2 Q And --

3 A I also see the first paragraph under  
4 "Pledge Programming," which does note that this method  
5 is somewhat imperfect.

6 Q Well, however perfect or imperfect it is,  
7 it was at least sufficient for purposes of the  
8 Corporation for Public Broadcasting to utilize their  
9 limited resources to put out this report, wasn't it?

10 A Yes.

11 Q And there's a chart here that's -- or a  
12 graph, I guess, Mr. Downey, which happens to have been  
13 reproduced by my friends at White & Case -- this  
14 happens to be sitting here -- which shows the relative  
15 importance of music/dance in percentage of air time.  
16 Do you see that?

17 A Yes.

18 Q And you don't have any reason to disagree  
19 with that -- that the music and dance component is --  
20 on pledge days is as significant as it appears from  
21 the graph?

22 A Only just noting, again, the caveat in

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1 this report itself. With that caveat, this -- I would  
2 accept this.

3 Q Now, you also have acknowledged or  
4 indicated in your written testimony that children's  
5 programming has shown a trend of revitalization after  
6 a period of decline, correct?

7 A Yes.

8 Q And I think on page 23 of your testimony  
9 you indicated 29 percent of public broadcasting's  
10 broadcast hours in 1994 were children's programming,  
11 correct? Page 23?

12 A I see it. I'm just trying to reflect --  
13 recall what it's 29 percent of. But I certainly said  
14 that in my testimony, yes.

15 Q And you don't know what 29 percent refers  
16 to? If you'll look on page 21 of your testimony,  
17 there appears to be a chart there entitled "Percentage  
18 of Broadcast Hours Represented by Various Program  
19 Types."

20 A Yes.

21 Q While my math skills are not quite as  
22 adept as others, it would appear that if you combine

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1 the numbers for general children's and youth and  
2 Sesame Street for 1994, you come up with 29 percent.

3 A That's my recollection. That's where that  
4 number came from.

5 Q And that would be a percentage of all  
6 broadcast hours, correct?

7 A Yes.

8 Q Have you had an opportunity to compare  
9 that number with the number that Dr. Jaffe utilized in  
10 his written testimony for purposes of describing the  
11 broadcast hour components of public television?

12 A I'm sorry. I haven't read Mr. Jaffe's  
13 testimony in several months, so you'll have to --

14 Q Well, there's a chart at the end of his --  
15 in his testimony, and that's -- his testimony is the  
16 first part of this written testimony package. It's  
17 data underlying Figure 4, and it appears, since it's  
18 not -- eight pages after his signature.

19 A PBS program hours by program type?

20 Q Right. 1992 to 1996.

21 A Okay.

22 Q And your written testimony referred to

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1 1994, indicated children's programming represented 29  
2 percent of broadcast hours for 1994. Dr. Jaffe says  
3 30.7 percent for 1994. But my real focus was on 1996,  
4 and the fact that, at least according to Dr. Jaffe,  
5 children's programming had increased to 33.4 percent  
6 of the total broadcast hours. Do you see that --

7 A Yes.

8 Q -- Mr. Downey?

9 A Yes.

10 Q Does that conform to your understanding of  
11 the relative percentage of broadcast hours that  
12 children's programming occupied in 1996 on public  
13 television?

14 MR. RICH: I object to the form of the  
15 question.

16 CHAIRPERSON GRIFFITH: Do you want to  
17 respond?

18 MR. KLEINBERG: I'm not sure I understand  
19 what the basis of the objection is, so I don't --

20 MR. RICH: I believe it's a misportrayal  
21 of what the data underlying Figure 4 purport to  
22 represent.

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1 CHAIRPERSON GRIFFITH: Well, why don't you  
2 rephrase the question.

3 BY MR. KLEINBERG:

4 Q Well, let me ask you whether you have --  
5 would you have any reason to believe that children's  
6 programming, in terms of program hours, was not 33.4  
7 percent in 1996?

8 A I want to be -- there are some apples and  
9 oranges here. The data we're looking at, the data  
10 underlying Figure 4, refer to programs distributed by  
11 PBS, as distinct from programs broadcast by public  
12 television stations. So the number in my testimony is  
13 based on the so-called Katzman Report, which is of --  
14 the broadcast hours of all TV stations of programming  
15 from all sources, in contrast to these data.

16 Q So this is -- Dr. Jaffe is talking about  
17 just the PBS national feed?

18 A Well, I'm not -- I'm not going to tell you  
19 what I think -- what Dr. Jaffe is talking about, but  
20 I can tell you these data have to do with programs  
21 distributed by PBS.

22 Q When you say "these data," which data are

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1 you referring to?

2 A Data underlying Figure 4.

3 Q Okay. And the 29 percent figure that you  
4 use referred to all public television, not just the  
5 PBS feed?

6 A That's correct.

7 Q Okay. And would you agree with me, Mr.  
8 Downey, that the children's programming that is  
9 broadcast on public television contains significant  
10 amounts of copyrighted music?

11 A That's my impression.

12 Q And you have not done any music analysis  
13 yourself, in terms of --

14 A I have not.

15 Q -- amount of music, or the like, is that  
16 correct?

17 A That's correct.

18 Q And to the extent that you refer to music  
19 use data in your written testimony, that's all  
20 derivative of what Dr. Jaffe had in his written  
21 testimony, is that also correct?

22 A That's correct.

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1 Q Now, lastly, you indicated, I believe --  
2 strike lastly.

3 Penultimately, while we are on the subject  
4 of music and PBS programming, would you agree that  
5 music programming is an important component of PBS  
6 programming in general?

7 A Yes, it's an important component.

8 Q And do you know an individual by the name  
9 of Glenn DuBose?

10 A I do.

11 Q And is Mr. DuBose the Director of Drama,  
12 Performance, and the Arts at PBS?

13 A I think that's the correct title, yes.

14 Q And I want to show you an article from  
15 Broadcasting & Cable, dated September 1, 1997, which  
16 I would ask to be marked as the next --

17 CHAIRPERSON GRIFFITH: BMI Exhibit 2X.

18 (Whereupon, the above-referred  
19 to document was marked as BMI  
20 Exhibit No. 2X for  
21 identification.)

22 BY MR. KLEINBERG:

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1           Q       And there is an article entitled "Music is  
2       in the Mix at PBS," which begins, "Music programming  
3       takes up little space on the commercial broadcast  
4       network's shelf, but that's not the case at PBS. The  
5       noncommercial network provides a lineup heavy with  
6       music series and specials." And then, it goes on to  
7       say, quoting supposedly from Mr. DuBose, "Our  
8       commitment is there, and it's strong." Is that a  
9       correct statement of PBS' position with respect to  
10      music utilized on the PBS network?

11               MR. RICH: May I ask for a clarification?  
12      There is a statement in the first paragraph which is  
13      not attributed to Mr. DuBose, and then there's a  
14      quote, and I'm not clear if Mr. Kleinberg is asking  
15      this witness to affirm the quote or the preceding  
16      paragraph as well.

17               BY MR. KLEINBERG:

18           Q       Let's take them separately, which is the  
19      first paragraph which says, "Music programming takes  
20      up little space on the commercial broadcast network's  
21      shelf, but that's not the case at PBS. "The  
22      noncommercial network provides a lineup heavy with

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1 music series and specials." And do you agree with  
2 that, Mr. Downey?

3 A Well, I -- you know, I agree with the data  
4 that we've been looking at this morning. I hesitate  
5 to characterize it beyond that. It is what it is.

6 Q And so you're not prepared to put a  
7 qualitative or quantitative judgment on that data?

8 A Well, it's -- you know, it's more than --  
9 I'm willing to accept that it's more than appears on  
10 commercial broadcasts, although I sure haven't  
11 conducted any study of that. There is a goodly amount  
12 of music and performance programming and particularly  
13 associated with pledge and during other times of the  
14 year. There has been for years. It has changed  
15 somewhat over the years, but basically we are -- we  
16 have a commitment to that, just as we have a  
17 commitment to public affairs, as we have a commitment  
18 to children's programming.

19 Mr. DuBose is expressing, you know, his  
20 point of view because that's his area. And I accept  
21 and agree with that, but I don't want to leave any  
22 impression that suddenly PBS has a greater commitment

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1 to music programming than any other kind.

2 Q But would you accept the characterization  
3 that there is a commitment, a strong commitment, to  
4 music as part of the PBS programming?

5 A Yes.

6 Q And would you agree that music is  
7 important to PBS because it enables PBS to reach a  
8 vast audience?

9 A Well, I mean, I'm mindful of what I said  
10 earlier about vast audiences. I think I would be more  
11 comfortable with diverse audiences than vast. We're  
12 just not in the vast audience business. I think --  
13 well, I'll leave it at that.

14 Q So you would accept diverse, but not vast,  
15 as why music is important to PBS, in terms of the  
16 ability to reach the audience?

17 A PBS believes in presenting diverse in --  
18 programs, quality programs, to its audience. That  
19 includes music, and we try to meet that same standard  
20 in that genre. And, you know, we hope it will be  
21 appreciated and watched.

22 Q But as you said before, you don't

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1 particularly care how many people watch it?

2 A Well, I care that it's watched, but the  
3 objective is not simply a large viewership. If it  
4 were, there would be a different kind of programming  
5 on PBS. That should be self-evident.

6 Q Well, is an objective that you get as many  
7 people to watch it, not whether it's simply to get  
8 many -- as many people as possible?

9 A Our predictions and -- lie in the programs  
10 themselves, meaning, you know, our tests of editorial  
11 integrity, of quality, of diversity, we are, again,  
12 proud of those programs. We -- they are consistent  
13 with our mission, and we -- we hope that they will be  
14 widely viewed and appreciated. But if the objective  
15 were simply a 15 rating or a 20 rating, it would be a  
16 different kind of programming. Music certainly  
17 contributes to that.

18 Q Other things being equal, does PBS prefer  
19 to have a larger or smaller audience for its programs?

20 A Other things being equal, a larger --  
21 sure. I mean, you know, tonight you can watch Bill  
22 Moyers on Addiction, a three-night special -- Sunday,

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1 Monday, and Tuesday night. I will wager you you  
2 wouldn't find that on commercial broadcasting. It's  
3 not going to attract a large audience. Are we  
4 committed to it? Yes, by definition; it's on the air.

5 Q Lastly, you indicated, I think, on your  
6 direct testimony that BMI and ASCAP music licensing  
7 fees for the next five-year period for public  
8 television shouldn't go up. And my question to you,  
9 sir, is, can you tell the Panel what the public  
10 television music licensing fee is today for BMI and  
11 ASCAP?

12 A I believe it's -- I'm not -- I'm not sure  
13 I'm precise about this. I believe it's around  
14 \$4-1/2 million a year.

15 Q And is that for public television?

16 A That's for both, public radio and  
17 television.

18 Q My question was specifically focusing on  
19 public television. What is the fee that exists with  
20 respect to public television?

21 A I'm not -- I'm not sure I know.

22 Q Do you know, relative to public radio,

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1 what the breakout is between the fee --

2 A I recollect --

3 Q -- that the public broadcasters are  
4 seeking in this case?

5 A My collection is that the television piece  
6 is 3.7, 3.6, and radio is the remainder, bringing it  
7 to about 4.5. But --

8 Q And is that reflected in your testimony  
9 anywhere, sir?

10 A I don't believe so.

11 Q And where would that breakout come from?

12 A My recollection of conversations and 20  
13 years of experience in public broadcasting.

14 Q And can you explain to the Panel what the  
15 allocation is between public television and public  
16 radio in terms of the fee --

17 A No.

18 Q -- and how it was arrived at?

19 A No.

20 Q I'm sorry. I -- you're saying 3.6 out of  
21 4.5 refers to public television?

22 A I believe that's correct.

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1 Q But you don't know how that was arrived at  
2 in terms of breaking the fee into the two components  
3 for TV and radio, right?

4 A Well, I believe it was arrived at through  
5 arms length negotiations. But --

6 Q Oh, I see. You believe that there was a  
7 negotiation with the performing rights organizations  
8 separately with respect to the television and radio  
9 fee?

10 MR. RICH: I'm going to object to this  
11 line. The predicate questions from the examiner  
12 presupposed that there was such a separate negotiated  
13 fee, which we all know, in fact, is not true. And I  
14 think it's terribly misleading to the witness to  
15 pursue this line of questioning.

16 CHAIRPERSON GRIFFITH: Do you want to  
17 respond?

18 MR. KLEINBERG: Actually, I wasn't  
19 presupposing anything. I was asking whether, in fact,  
20 there has been any allocation done by public  
21 television and/or public radio of what had been a  
22 unitary fee. That was the import of my question.

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1 MR. RICH: I believe -- well, I have no  
2 problem with that question. I don't believe that was  
3 the purport of the earlier questions, however.

4 CHAIRPERSON GRIFFITH: Can you answer that  
5 question, sir?

6 THE WITNESS: Could you repeat the  
7 question?

8 CHAIRPERSON GRIFFITH: Sure.

9 BY MR. KLEINBERG:

10 Q You indicated that there was a total fee  
11 paid for radio and television of \$4.5 million. And my  
12 question to you is whether there has been an  
13 allocation of that total fee as between how much  
14 represents the fee for public television and how much  
15 for public radio.

16 A Well, it's all paid by -- or has been paid  
17 by the Corporation for Public Broadcasting. You asked  
18 me if I knew what the allocation was or, you know, how  
19 much was for TV and how much is radio. And I'm,  
20 frankly, guessing. That's my recollection, but I  
21 can't tell you why I know that or where it came from.

22 Q But you do believe you have an

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1 understanding that there has been a breakout of the  
2 total fee into the two constituent parts of television  
3 and radio?

4 A Again, you asked me for -- if I knew, and  
5 I'm telling you what I -- what I recall or what comes  
6 to mind. And I thought that it was compartmentalized.  
7 I could be wrong. I don't know.

8 JUDGE GULIN: Whatever the fee, whatever  
9 the allocation happens to be -- and you're obviously  
10 not exactly sure what it is -- is it your impression  
11 that that allocation was negotiated between --

12 THE WITNESS: I have no idea. I probably  
13 should have pleaded ignorance about four questions  
14 ago.

15 JUDGE DREYFUS: One moment, please.

16 MR. KLEINBERG: Sure.

17 CHAIRPERSON GRIFFITH: Go ahead.

18 JUDGE DREYFUS: Are you staying with this  
19 area, or are you going on to something else?

20 MR. KLEINBERG: This was the last -- I was  
21 going to ask one or two followup questions on this.

22 JUDGE DREYFUS: Okay. My problem is that

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1 there hasn't been a foundation laid with this witness  
2 that he would even be qualified to answer these  
3 questions.

4 MR. KLEINBERG: Well, my question was  
5 whether he knew about it.

6 BY MR. KLEINBERG:

7 Q And this is going to be my followup  
8 question. You indicated that the Corporation for  
9 Public Broadcasting pays the music license fees,  
10 correct?

11 A Correct.

12 Q And the corollary of that also is public  
13 -- PBS hasn't paid any portion of that fee, is that  
14 correct?

15 A That's technically correct. But we think  
16 of the money the corporation has as being funds  
17 available for public television of which we are part.  
18 So with that caveat --

19 Q And --

20 A If CPB didn't have to pay that amount,  
21 then that's money that would be distributed to public  
22 television and radio stations and could end up in

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1 programming or for some other purpose.

2 Q And have you participated in any  
3 discussions or analysis with persons at the  
4 Corporation for Public Broadcasting as to what the  
5 appropriate levels of fees should be with respect to  
6 the performing rights music licensing organizations?

7 A I don't --

8 MR. RICH: May I caution the witness, with  
9 the Panel's consent, not to reveal any privileged  
10 conversations he might have had in this regard.

11 CHAIRPERSON GRIFFITH: Attorney-client  
12 privilege.

13 MR. RICH: Yes.

14 THE WITNESS: And I was going to say that  
15 I've had conversations about this with counsel, but I  
16 don't honestly -- I don't think I've had any direct  
17 conversations with any CPB employees, at least in the  
18 last several months, about this subject.

19 BY MR. KLEINBERG:

20 Q Well, you indicated that if CPB didn't pay  
21 the fee, then that money would be available for  
22 distribution to public television/public radio, right?

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1           A       Yes.

2           Q       And my question was, do you have in mind,  
3 or do you have an understanding of how much of the  
4 money would be available or has, in effect, been taken  
5 away from public television as a result of the fee  
6 being paid by Corporation for Public Broadcasting?

7           A       Are you asking me what the fee is?

8           Q       I'm asking you -- you told me what you  
9 thought the fee was, which was 4.5 million. I think  
10 actually the fee was 3.925 million. But assuming that  
11 that's the fee, my question is whether you have any  
12 understanding of what portion that amount of the fee  
13 represents for purposes of public television?

14          A       CPB has a statutory obligation to pay the  
15 fee, so it's -- you know, it's a hypothetical question  
16 that I haven't dwelled upon, and --

17               JUDGE DREYFUS: Does that mean CPB cuts  
18 the check?

19               THE WITNESS: To the best of my knowledge,  
20 yes.

21               JUDGE DREYFUS: They cut the check  
22 directly to ASCAP and BMI?

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1 THE WITNESS: That's my understanding,  
2 yes.

3 JUDGE DREYFUS: Okay.

4 THE WITNESS: That the --

5 BY MR. KLEINBERG:

6 Q And following up, if I might, there is no  
7 chargeback to the public television stations or radio  
8 stations or PBS for any amount of that fee, correct?

9 A To the best of my knowledge, there is no  
10 allocation or division or penalty or, you know, even  
11 as far as -- I'm not even sure as to the -- there's  
12 been any publication. I believe that the -- the data  
13 has been embargoed -- has -- you know, has been held  
14 confidential in past years.

15 Q I'm sorry. What data?

16 A Whatever the fee was --

17 Q Oh.

18 A -- was treated as confidential  
19 information. I'm not sure why, but that's my  
20 understanding.

21 Q Finally, Mr. Downey, I --

22 (Laughter.)

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1                   -- someone has asked me to ask this  
2 question. It was not -- I would have been done.

3                   When you were good enough to provide us  
4 with some information on the formula for the  
5 programming assessment, and you indicated 20 percent  
6 was attributed to the size of the population, and then  
7 you said there was another percentage for the non-  
8 federal revenue and another percentage for the  
9 station's adjusted budget, do you -- can you supply us  
10 with what those percentages are for the other two  
11 components?

12                  A       I was afraid you would ask that. I -- I  
13 believe it's 45 percent adjusted budget, 35 percent  
14 Community Service Grant factor, and 20 percent  
15 population, and I hope that adds to 100.

16                  MR. KLEINBERG: I'm reminded that I should  
17 also move into evidence whatever it is that I offered,  
18 which would be --

19                  CHAIRPERSON GRIFFITH: BMI 1 -- Exhibits  
20 1 and 2.

21                  MR. KLEINBERG: Right.

22                  CHAIRPERSON GRIFFITH: Any objection?

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1 MR. RICH: No objection to 1X.

2 CHAIRPERSON GRIFFITH: All right. 1X is  
3 received.

4 (Whereupon, the above-referred  
5 to document, previously marked  
6 as BMI Exhibit No. 1X for  
7 identification, was received in  
8 evidence.)

9 MR. RICH: 2X is an opinion piece, which  
10 -- as to which I would certainly not object for the --  
11 to its admission for the limited purpose of the  
12 witness' reactions to Mr. DuBose's comments. But as  
13 to the rest, this is an opinion piece by some  
14 columnist.

15 CHAIRPERSON GRIFFITH: All right.

16 JUDGE DREYFUS: Does that mean no  
17 objection?

18 JUDGE GULIN: No, I don't think --

19 MR. RICH: It means I do object if it  
20 comes in for all purposes.

21 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do  
22 you have any response?

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1 MR. KLEINBERG: Well, let me ask a  
2 followup question, if I could, please, to the witness.

3 BY MR. KLEINBERG:

4 Q Mr. Downey, are you familiar with the  
5 publication Broadcasting & Cable?

6 A I am.

7 Q And would you agree that that is a  
8 standard industry publication?

9 A It is.

10 Q And with respect to the balance of the  
11 article, which I didn't go into, there is a series of  
12 information about musical programs that are appearing  
13 or are scheduled to appear on public television. Do  
14 you see that?

15 A I do.

16 Q Do you have any reason to doubt the  
17 accuracy of those programs and their -- the fact that  
18 they are part of, or have been part of, public  
19 television?

20 MR. RICH: Object to the form.

21 CHAIRPERSON GRIFFITH: Do you want to  
22 respond before we sustain the objection, Mr.

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1 Kleinberg?

2 (Laughter.)

3 MR. KLEINBERG: Well, I'll rephrase the  
4 question.

5 CHAIRPERSON GRIFFITH: Thank you.

6 BY MR. KLEINBERG:

7 Q Do you have any understanding, based upon  
8 your responsibilities at PBS, as to whether the  
9 programs listed in this article out of Broadcasting &  
10 Cable, dated September 1, 1997, are, in fact, programs  
11 that are part of the public broadcasting feed?

12 A They appear to me to be -- to be that,  
13 yes.

14 Q Okay.

15 MR. RICH: I'll withdraw my objection  
16 based on the witness' answer.

17 CHAIRPERSON GRIFFITH: All right. 2X --  
18 BMI Exhibit 2X is accepted into evidence.

19 Thank you.

20 (Whereupon, the above-referred  
21 to document, previously marked  
22 as BMI Exhibit No. 2X for

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1 identification, was received in  
2 evidence.)

3 MR. KLEINBERG: I am done.

4 CHAIRPERSON GRIFFITH: All right. Thank  
5 you, sir.

6 MR. RICH: Your Honors, I will have some  
7 redirect. And if we might take a slightly early mid-  
8 morning break, and if we could expand it by five or 10  
9 minutes, I would be appreciative. Can we get a total  
10 of 20 minutes?

11 CHAIRPERSON GRIFFITH: All right. We'll  
12 take a recess for 20 minutes.

13 (Whereupon, the proceedings in the  
14 foregoing matter went off the record at  
15 11:18 a.m. and went back on the record at  
16 11:42 a.m.)

17 REDIRECT EXAMINATION

18 BY MR. RICH:

19 Q Mr. Downey, I briefly want to touch on a  
20 few areas which Mr. Schaeffer and/or Mr. Kleinberg  
21 touched on with you for purposes of clarification.

22 I'd ask you first to turn to the

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1 compendium of data appearing at PB 4, which is the CPB  
2 fiscal year annual reports.

3 Do you have that in front of you?

4 A I do.

5 Q And if you would turn to the first  
6 document in that compendium which is fiscal year 1992  
7 data, and turn to what is marked Table 2, please.

8 A Yes.

9 Q Am I correct, down at the entry for  
10 business for public television, that business  
11 contributions to public -- pardon me, to public  
12 television income for FY1991 represented just over 17%  
13 of total income for public television system-wide?

14 A That is correct.

15 Q I'm reading that correctly?

16 And then flipping over to the next to last  
17 page in that compendium which is the FY1996 data, if  
18 you would go to the comparable line under business and  
19 go over to the column listed television system, am I  
20 correct that the percentage reflected by business  
21 dropped to 15% of total television system income?

22 A That's correct.

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1 Q Now what happened to the absolute dollars  
2 for business contribution between FY91 and FY96 if you  
3 compare these two documents?

4 A Total business contributions actually  
5 declined.

6 Q Can you read the appropriate numbers into  
7 the record, please?

8 A Total business contributions to public  
9 television in fiscal 1991, \$229,967,000. And for  
10 fiscal 1996, \$223,251,495. So a reduction of  
11 approximately \$6 million dollars.

12 Q And that's between FY91 and FY96, correct?

13 A Correct.

14 Q And as we've established, the percentage  
15 which such contributions reflected, a total system  
16 income decreased from 17 to 15%, correct?

17 A Correct.

18 Q Now --

19 JUDGE GULIN: Let me just ask. The term  
20 "business," is that synonymous with corporate  
21 underwriting grants?

22 THE WITNESS: It includes --

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1 JUDGE GULIN: Does it encompass something  
2 else?

3 THE WITNESS: It includes corporate  
4 underwriting grants, but it's not exclusively  
5 underwriting.

6 JUDGE GULIN: What else does it include?

7 THE WITNESS: Charitable contributions by  
8 businesses to stations. You know, a \$500 annual  
9 contribution or a contribution to an endowment or  
10 capital fund raising campaign.

11 BY MR. RICH:

12 Q Now let's take a look, if you will -- do  
13 you still have handy what was marked as ASCAP 14X,  
14 which is the 1997 PBS report, which is this document?

15 A Yes.

16 Q Would you look at page two of this  
17 document, please?

18 Now do you recall Mr. Kleinberg asked you  
19 some questions relating to what I believe he termed  
20 donated broadcast time, is that right?

21 A Donated broadcast rights.

22 Q Rights. And we talked about footnote

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1 seven and etc. associated with those?

2 A Yes.

3 Q Now on page two, in the upper right hand,  
4 you'll see a category called program underwriting. Do  
5 you see that?

6 A I do.

7 Q And what is your general understanding of  
8 what that category comprises?

9 A I believe that's donated program rights.

10 Q So we're talking about the same thing?

11 A One and the same.

12 Q And I believe Mr. Kleinberg pointed out to  
13 you that, between FY96 and FY97, there was an increase  
14 in this category of from approximately \$139 million  
15 dollars to approximately \$142 million dollars, is that  
16 correct?

17 A Yes.

18 Q What happened to this category between  
19 FY95 and FY97?

20 A Well, '95, according to our certified  
21 financials, it was \$162.3 million dollars. And it --  
22 so from '95 to '97, it declined to \$142.6 or

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1 approximately \$20 million.

2 Q So I take it that's consistent with your  
3 prior testimony on cross examination by Mr. Kleinberg  
4 that, to the best of your recollection, there was a  
5 decline in corporate underwriting between the '95 and  
6 '97 period, correct?

7 A Well, as we established, these donated  
8 program rights include amounts from other than  
9 corporations; but yes, in answer to your second part  
10 of your question, yes, corporation underwriting also  
11 declined over the same period.

12 Q Well, let me ask you, the two sets of data  
13 we just looked at, the system-wide data respecting  
14 business contributions and the PBS data respecting  
15 what's termed program underwriting, do those data, at  
16 least for the periods we've just reviewed, reveal a  
17 pattern of increasing corporate dominance of public  
18 television?

19 A Certainly not.

20 Q Now Mr. Schaeffer also showed you a nice  
21 color chart from an exhibit in evidence as ASCAP 301,  
22 and I'd like to take a look at that with you if we

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1 could, please. This was the CPB 1996 annual report.  
2 This was both this and a color chart of page 17 from  
3 that document.

4 A Okay.

5 Q This is ASCAP 301 which is the 1996 CPB  
6 annual report. And I'll let you look at the color  
7 chart here, sir.

8 And I'm going to direct your attention to  
9 page 17 of that document and let the Panel catch up  
10 here with the documents. Take your time.

11 JUDGE GULIN: Is that the one there was  
12 some confusion on the number? I have it 302.

13 MR. RICH: There was confusion on the  
14 number. Looks like this.

15 Judge Gulin, do you have yours?

16 CHAIRPERSON GRIFFITH: 301 or 302 now?

17 MR. RICH: Is it 302.

18 MR. SCHAEFFER: It's this document.

19 CHAIRPERSON GRIFFITH: Yeah, I know.

20 MR. RICH: Maybe I mismarked it. I had  
21 marked it as 301. Whatever it is, I think we know  
22 which document we're referring to.

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1 MR. SCHAEFFER: 302.

2 CHAIRPERSON GRIFFITH: It's 302.

3 MR. RICH: Thank you. My apologies.

4 BY MR. RICH:

5 Q Now Mr. Schaeffer showed you this document  
6 and, as you and he discussed, it breaks down public  
7 broadcasting income between private and governmental  
8 sources, does it not?

9 A It does.

10 Q Now if one wanted to determine, sir, what  
11 percentage of total broadcasting income in a given  
12 year came from private sources, am I correct that you  
13 would take the number at the top of the black circles,  
14 which is the private revenue number, yes, and divide  
15 that by the top line number labeled total to arrive at  
16 the percentage which private income sources  
17 represented of total public broadcasting income  
18 sources?

19 A Yes.

20 Q And so, for example, for 1985, to  
21 illustrate, we would divide \$559 million dollars  
22 reflecting income from private sources by \$1.096

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1 billion dollars?

2 A Yes.

3 Q And, by my math, that yields a percentage  
4 of \$51% of private source contributions. Sound about  
5 right?

6 A Sounds right.

7 Q Now for each of the later years, I'll  
8 represent to you that my math, subject to other people  
9 checking, revealed the following ratios: for 1987,  
10 51%; for 1989, 53%; for 1991, 53%; for 1993, 53% --  
11 pardon me, did I say -- for 1991 it's 51%; for 1993,  
12 53%; and 1995, 53%.

13 Now taking, for purposes of my question,  
14 my math to be accurate, is that pattern roughly  
15 consistent with your own experience and understanding,  
16 namely that there has been relatively little change at  
17 least back to 1985 in the private/public mix of  
18 funding sources?

19 A That's consistent with my sense of this,  
20 yes.

21 Q And I take it we agree that the private  
22 sources, that is the numbers comprehended in these

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1 black circles adding up to the total, encompass far  
2 more than corporate underwriting support, isn't that  
3 true?

4 A Oh, yes, yes.

5 Q It's membership dollars and other private  
6 sources, correct?

7 A Yes.

8 Q Now in this connection, Mr. Schaeffer  
9 asked you a question -- I'm sorry, I don't have the  
10 transcript yet from yesterday, but my notes reveal  
11 that his question to you asked you to confirm that a  
12 combination of corporation and pledge drive sources  
13 form the predominant source of public television  
14 funding.

15 Your answer, I believe, was to agree that  
16 membership income and corporate support formed the  
17 majority share; but so the record is clear, did you  
18 intend to indicate membership plus corporate or pledge  
19 support plus corporate?

20 What's your answer?

21 A Pledge support is only a fraction of the  
22 larger category called membership which incorporates

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1 other -- you know, all of the funds raised from all of  
2 the techniques used by stations. And that's what I  
3 understood the context of his question to be, which is  
4 why I said membership plus business does constitute  
5 the largest source.

6 Q Thank you.

7 Now you were asked some questions by Mr.  
8 Schaeffer relating to the PBS Sponsorship Group. Do  
9 you remember you had a conversation with him about  
10 that?

11 A Yes.

12 Q And specifically, you were shown a press  
13 release which I'd like you to put in front of you  
14 which was marked but not offered in evidence as ASCAP  
15 -- pardon me.

16 I beg your pardon. This is in evidence.

17 It's ASCAP 3X, a one page document that looks like  
18 this.

19 A I have it.

20 Q And you'll recall that this document touts  
21 the amount of corporate support garnered during the  
22 first six months of the group's -- of the Sponsorship

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1 Group's existence, yes?

2 A Yes.

3 Q Now my question is this. Absent the  
4 formation of the Sponsorship Group, would PBS and the  
5 four large stations involved in the Sponsorship Group  
6 nonetheless have continued to solicit corporate  
7 support on their own?

8 MR. SCHAEFFER: Objection. That's clearly  
9 leading.

10 MR. RICH: Well, let me ask it in a non-  
11 leading fashion, if I may, although I think I'm  
12 allowed some latitude on redirect.

13 What, in your estimation -- what  
14 activities in the underwriting vein do you believe  
15 that the four stations and PBS who comprise the PBS  
16 Sponsorship Group would have undertaken in the absence  
17 of this Sponsorship Group?

18 MR. SCHAEFFER: Objection. Hypothetical  
19 and -- now he's saying what other people and other  
20 stations would have done. If I had asked that  
21 question, he would have shot me.

22 CHAIRPERSON GRIFFITH: Oh, we haven't shot

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1 anybody yet, but --

2 (Laughter.)

3 MR. SCHAEFFER: I said he would have. I  
4 didn't ask it.

5 CHAIRPERSON GRIFFITH: Do you have any  
6 comments?

7 Are you asking for his opinion as to --

8 MR. RICH: Of course, based on -- of  
9 course, based on his knowledge of underwriting  
10 practices about which Mr. Schaeffer --

11 CHAIRPERSON GRIFFITH: All right, the  
12 objection's overruled.

13 Go ahead.

14 THE WITNESS: The Sponsorship Group  
15 consists of the four stations and PBS that we  
16 identified yesterday, all of whom -- or each of which  
17 -- each of those four stations has a long history of  
18 attempting to raise corporate underwriting for its  
19 programs.

20 The Sponsorship Group represents a  
21 coalition in the interest of more effective or more  
22 efficient underwriting. But had that Sponsorship

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1 Group not come about, those four stations would have  
2 continued operating independently to seek -- to  
3 achieve the same end, which is to raise as much  
4 corporate underwriting for their programs as they can.

5 And so I think it's reasonable to assume  
6 some or all of this \$7.5 million might have been  
7 raised in that circumstance.

8 MR. RICH: So to conclude that this is all  
9 incremental or found money that would not otherwise  
10 have been available to the stations or to PBS is  
11 speculative, correct?

12 MR. SCHAEFFER: Objection; leading.

13 CHAIRPERSON GRIFFITH: It's leading.

14 The objection is sustained.

15 MR. RICH: Let me move on, Mr. Downey.

16 Mr. Schaeffer showed you another document.  
17 This one he did not, however, offer. This is ASCAP 7X  
18 which I'd ask you to put in front of you. It's a  
19 piece from *The Cincinnati Inquirer* dated October 10,  
20 1996.

21 MR. SCHAEFFER: Can you wait just a  
22 second, Mr. Rich?

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1 MR. RICH: Sure.

2 MR. SCHAEFFER: Thank you.

3 BY MR. RICH:

4 Q If I can direct your attention to the  
5 second page of this document, Mr. Downey. It's the  
6 one to your right.

7 A Yes.

8 Q This was a piece relating to the Wishbone  
9 series, I believe.

10 A Yes.

11 Q Do you see on the second page there's a  
12 quote from a Rick Duffield?

13 A Yes.

14 Q And who is Mr. Duffield, do you know?

15 A Duffield is the producer of the Wishbone  
16 series.

17 Q And the quote attributed to Mr. Duffield  
18 is, "'It's extremely difficult to find underwriters  
19 for children's programming on public television,'  
20 Duffield said in June. 'Companies are hesitant to  
21 commit marketing or advertising money for simply a ten  
22 second underwriting credit. A TV commercial has more

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1 value to them.'"

2 In your experience, is that an accurate  
3 statement?

4 A It's been very difficult over the years to  
5 find underwriting for children's programs, yes.

6 Q We would like to offer this document at  
7 this point.

8 MR. SCHAEFFER: No objection.

9 CHAIRPERSON GRIFFITH: All right, it will  
10 be received.

11 Mr. Kleinberg, do you have any --

12 MR. KLEINBERG: No.

13 JUDGE GULIN: Let me ask, Mr. Rich, you  
14 don't have extra copies, do you?

15 MR. RICH: I do not.

16 MR. SCHAEFFER: We have them and we will  
17 give them to you. Do you want it now or --

18 JUDGE GULIN: That would be helpful  
19 because it's now going to become PB Hearing Exhibit  
20 Number 1.

21 MR. SCHAEFFER: Yeah, it's 7X.

22 JUDGE GULIN: It's right now marked as an

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1 ASCAP exhibit.

2 MR. SCHAEFFER: It is; it's 7X for  
3 identification and we all agree it should go in  
4 evidence. But you were given copies yesterday.

5 CHAIRPERSON GRIFFITH: We have them, but

6 --

7 JUDGE GULIN: I understand.

8 CHAIRPERSON GRIFFITH: -- we need to mark  
9 them now as Public Broadcasting Exhibit --

10 MR. SCHAEFFER: Do you want to use mine?

11 JUDGE GULIN: Hearing Exhibit 1.

12 MR. RICH: Thank you.

13 MR. SCHAEFFER: Do you want another copy?

14 JUDGE GULIN: It would be helpful to have  
15 that, yes.

16 MR. RICH: Thank you.

17 (Whereupon, the above-mentioned  
18 document was marked as PB  
19 Exhibit 1 for identification.)

20 (Whereupon, the above-mentioned  
21 document, previously marked as  
22 P B Exhibit 1 for

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1 identification, was received in  
2 evidence.)

3 BY MR. RICH:

4 Q Mr. Downey, Mr. Schaeffer also showed you  
5 some public television station Web pages purporting to  
6 publicize those stations' advertising practices. Do  
7 you recall those documents?

8 A Yes.

9 Q Am I correct -- or let me ask you this.  
10 Prior to the advent of the Internet and the Web pages,  
11 to your knowledge, did stations -- were stations able  
12 to communicate their underwriting practices in some  
13 other fashion?

14 A Yes.

15 Q What were some --

16 A They would produce press kits or, you  
17 know, kits to be used by their representatives to  
18 distribute it amongst businesses in the community.

19 Q Is there anything -- as you had occasion  
20 to review the documents you were shown yesterday, the  
21 Web page excerpts, was there anything different or  
22 unusual in the nature of the message that was being

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1       communicated by these documents as opposed to the  
2       former techniques you just averted to?

3               A       Essentially the same content. You know,  
4       what the benefits are, who some of the, you know,  
5       traditional or longstanding local underwriters may be.  
6       Again, essentially the same information.

7               Q       Thank you.

8                       Now you were asked yesterday also certain  
9       questions about the PBS National Funding Standards and  
10      Practices Manual from February of 1997 which is in  
11      evidence as ASCAP 4X. Do you recall that?

12              A       Yes.

13              Q       Now Mr. Schaeffer focused you on the  
14      things that these guidelines seem to allow. I'd like  
15      to ask you a few questions about what these guidelines  
16      do by way of limitation, okay?

17                      And first and foremost, I'd ask you to  
18      turn to page seven of this document which is labeled  
19      Roman II, general principles for determining the  
20      acceptability of national program funding.

21                      Do you have that?

22              A       Yes.

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1           Q     Could you describe for the Panel what  
2 these general principles entail?

3           A     There are two aspects to administering  
4 these guidelines. One is determining whether there is  
5 any relationship between the underwriter and the  
6 content of the program that would cause us to question  
7 the acceptability.

8                     So it's a sort of relationship test. And  
9 the second part is reviewing the actual announcement  
10 that is proposed to appear on the program itself. Now  
11 with respect to that first part, we administer  
12 essentially three tests.

13                    The first is called the editorial control  
14 test. And our interest here is in preserving and  
15 protecting the editorial integrity of PBS and public  
16 television by ensuring that the underwriter had no  
17 involvement in the editorial content or no ability to  
18 affect the editorial content whether or not the  
19 ability may have been exercised.

20                    And if we were to discover such a thing,  
21 we would reject the program.

22                    The second test is the editorial

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1 perception test which is a little more difficult. And  
2 what that addresses is circumstances where even though  
3 there may be no connection between the underwriter and  
4 the content of the program, by virtue of the nature of  
5 the underwriter and its business and the content of  
6 the program, a reasonable viewer might conclude  
7 otherwise.

8 So, for example, if there were to be a  
9 documentary about the history of Saudi Arabia and  
10 Mobil Oil Corporation were the underwriter, a  
11 reasonable person might conclude that Mobil Oil had  
12 something to do with the content of the program, which  
13 would be inappropriate given our objective again for  
14 editorial integrity.

15 And so we would reject that relationship  
16 on those grounds, the editorial perception test. The  
17 third test is a commercialism test which, in some  
18 ways, is similar to the editorial perception test.

19 And it asks is the reason the underwriter  
20 is involved in this program and is the reason the  
21 underwriter has contributed, so far as we can tell,  
22 purely a charitable act or does the underwriter have

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1 some commercial interest at stake here.

2 If, for example, the program is about the  
3 history of the automobile and the underwriter were the  
4 Ford Motor Company, one could conclude that Ford's  
5 interest is in selling cars and that would be an  
6 impermissible relationship.

7 So we would decline to accept underwriting  
8 from Ford for that program on the grounds of  
9 commercialism as well as perception. And those --  
10 again, those two tests are somewhat similar but they  
11 go to somewhat different dimensions.

12 The rest of these guidelines then have to  
13 do with evaluating the specific messages that are  
14 submitted to us by the producer. They may have come  
15 from the underwriter or may have been produced by the  
16 producer.

17 But in any event, they have to --

18 Q Let me interrupt you just to ask if, as  
19 you proceed, are you referring now to the rules that  
20 begin at page 16 of this document?

21 A Yes, that's correct.

22 Q Could you just very quickly point out some

1 of the most salient features of those rules as they  
2 apply to PBS national fed programming?

3 A Yes.

4 Sort of taking them in sequence, rule one  
5 is important because what it says is, no matter how  
6 well you may comply with rule two to end, at the end  
7 of the day, we can still reject an announcement for  
8 being too commercial even though you may have complied  
9 technically with all the rules.

10 Going on to specifics on the next page, on  
11 page 17 in the middle of the page, for example, you  
12 see, what, 15 words. These are words that the FCC and  
13 various rulings with respect to individual stations  
14 have found to be impermissible.

15 And so these, for example, are words that  
16 cannot be used in the copy or in the script to  
17 accompany a particular underwriting credit. Turning  
18 the page to the top of page 18, you'll see recited  
19 there a number of specific prohibitions underwriting  
20 credits on PBS.

21 And by and large, by the way, these  
22 reflect the FCC's regulations; but we, of course,

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1 repeat them here. But among them are it would be  
2 impermissible to include a call to action, and you see  
3 the example "Get Met. It Pays."

4 You cannot use superlative descriptions or  
5 qualitative claims about a company, its product or its  
6 services. You're not allowed to make direct  
7 comparisons with other companies or with other  
8 companies' products or services.

9 Price or value information is not  
10 permitted, nor are inducements to buy, sell, rent or  
11 lease. And then -- and those are all FCC regulations.  
12 We've added endorsements. We would not permit an  
13 endorsement to be part of a PBS underwriting credit.

14 Going on in the next page, page 19,  
15 Section F, Use of People -- one of the things we  
16 sharply limit is the -- try to anyway is the use of  
17 actors in underwriting credits because that, almost  
18 without exception, is, in my mind, the difference  
19 between an announcement identifying an underwriter and  
20 something that gets much closer to an impermissible  
21 commercial.

22 And so, for example, we allow a product to

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1 be demonstrated, but you can only show hands or feet  
2 if it's a pair of shoes, for example, rather than  
3 seeing an entire person. But we make an exception for  
4 automobile drivers, it being worse to have a car  
5 moving without a driver than with one.

6 And you can see that we quickly get to  
7 angels on pin heads with some of these regulations.  
8 But in the end, the idea is to enable the company to  
9 identify itself and get fair credit for its  
10 contribution, but do so in a way that preserves the  
11 noncommercial character of public television.

12 We also allow people to be shown as to  
13 reflect a target population. One of the problems one  
14 sector of underwriters has, and I'm thinking of  
15 insurance companies, for example; they're interested  
16 in providing a product or a service that's valuable to  
17 a target population.

18 But we'll allow the use of people to  
19 represent that target population as distinct from  
20 being customers or employees. Again, these are just,  
21 you know, some of the examples of some of the  
22 limitations we impose.

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1           Q       You had yesterday -- if I may interrupt,  
2       you had yesterday responded to a question from Mr.  
3       Schaeffer relating to the permission to use 800  
4       numbers and Web addresses. And you were attempting,  
5       I think, to give a series of reasons, only one of  
6       which came out on cross examination, for the move in  
7       that direction.

8                        Would you like to expand on your answer  
9       from yesterday?

10                   MR. SCHAEFFER: This is leading also.

11                   CHAIRPERSON GRIFFITH: Do you have a  
12       response you want to make?

13                   MR. RICH: Sure, Your Honor.

14                   The record will show that the witness said  
15       there are several reasons. And after he gave one, he  
16       was cut off by Mr. Schaeffer. This is classic  
17       redirect to let him contextualize his answer.

18                   MR. SCHAEFFER: It's not classic redirect.  
19       Frankly, I didn't cut him off and it's not class  
20       redirect to lead the witness.

21                   CHAIRPERSON GRIFFITH: The objection's  
22       overruled.

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1 THE WITNESS: What I was going to say  
2 yesterday and didn't get a chance to is that we --  
3 there came a point in time when we encountered  
4 potential underwriters whose business is -- with whom  
5 you could only do business through an 800 number.

6 And so these were companies -- I'm trying  
7 to remember more detail. But, in any event, the only  
8 way they could identify their product or their service  
9 was to say the XYZ Company who provides an 800 number  
10 service and wanted to provide their 800 number, and  
11 that seemed to us to be not inconsistent with the  
12 objective here.

13 And that was another of the reasons that  
14 was brought -- you know, came into play when we  
15 decided to change the rule allowing 800 numbers.

16 Another reason was that early on, in the  
17 last 1980's when these rules were first put together  
18 by PBS, we were -- telephone numbers are explicitly  
19 permitted by the Commission, and that makes sense in  
20 a local context when you have a local company with a  
21 local telephone number.

22 But putting a telephone number on a

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1 nationally distributed underwriting credit, we were  
2 concerned that that might actually be regarded as a  
3 call to action. By virtue of putting up the number,  
4 are we saying call now 1-800 this and such?

5 But there was enough dicta from the FCC  
6 over the period since 1988 to persuade us that that  
7 was not a concern, and so we also -- that was another  
8 reason that we allowed 800 numbers.

9 I think the only other point I would want  
10 to make is with respect to children's programs over on  
11 page 23 and 24. And I think the key point here is  
12 that not only are our guidelines more conservative  
13 than what the Commission would allow, our guidelines  
14 with respect to children's programs are more  
15 conservative than what we allow for other day parts or  
16 for programs intended for other audiences.

17 And specifically, if -- you know, if there  
18 is a -- if the underwriting message is directed to  
19 children, then one of the requirements is that the  
20 message be limited to a message of support for  
21 education or for public television.

22 So in many -- in as many ways as we can,

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1 we do try to restrict or constrain or limit the  
2 promotional and commercial aspects of underwriting  
3 credits again to maintain the separation -- the  
4 distinction between public broadcasting and commercial  
5 broadcasting.

6 BY MR. RICH:

7 Q You were asked a series of questions  
8 mostly yesterday about pledge drives. Do you recall?

9 A Yes.

10 Q Are pledge drives a recent phenomenon?

11 A Heavens no. They go back to the 1970's.

12 Q And is the showing of special programming  
13 during pledge drives a recent phenomenon?

14 MR. SCHAEFFER: I object. Again, it's  
15 just leading the witness. I don't know if Mr. Rich is  
16 testifying about it.

17 CHAIRPERSON GRIFFITH: The objection is  
18 sustained.

19 BY MR. RICH:

20 Q What, in your experience, characterizes  
21 the programming that's offered during pledge periods?

22 A There are essentially two kinds of

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1 programming. One of the things we do is include in  
2 pledge drives our regular continuing series, but we  
3 certainly also try to incorporate into those drives  
4 what I'll call special programs which hopefully  
5 attract press attention and audience attention to  
6 bring viewers to participate in the pledge experience.

7 Q Now if you could put in front of you  
8 another document introduced yesterday which is ASCAP  
9 12X, which is a news piece from Public Broadcasting  
10 Report.

11 A Yes.

12 Q Do you see in the first paragraph there is  
13 a reference to a \$50 million dollar pledge drive yield  
14 for what is reported to be the prior year which I take  
15 to be 1996?

16 Do you see that?

17 A I see that.

18 Q To your knowledge, does that sound about  
19 right to you in terms of the level of pledge monies  
20 achieved system-wide?

21 A That sounds about right to me, yes.

22 Q I'd ask you to look over -- while you keep

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1 that number handy, please -- at PB 4 in the booklet.  
2 And if you would turn to FY1996 figures which are at  
3 the back of that booklet at Table 2.

4 A Yes.

5 Q And am I correct that reportable gross  
6 income for the television system for FY1996 as there  
7 reported is about \$1.48 billion dollars?

8 A Yes.

9 Q How would one go about determining the  
10 percentage of total system income that reported pledge  
11 money represented?

12 A Well, pledge money is included in the  
13 larger category of membership money. As we see here,  
14 membership money for that year was \$327 million. And  
15 as this Exhibit 12X reports, pledge -- total pledge  
16 revenues for that year were on the order of \$50  
17 million dollars.

18 So \$50 million divided by \$327 million  
19 would be their proportion of --

20 Q Roughly 15%?

21 A If -- thank you for doing the math.

22 Q Of membership income?

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1           A       Of total -- okay, 15% of membership income  
2 is attributable to pledge activities.

3           Q       And if we wanted to know what percent  
4 pledge activity in 1996 represented of total  
5 television system income, I take it the ratio would be  
6 \$50 million in the numerator and \$1.48 billion in the  
7 denominator?

8           A       Yes.

9           MR. SCHAEFFER: I object.

10          MR. RICH: Which, by my math, is three  
11 percent?

12          MR. SCHAEFFER: This is just leading --  
13 this is just argument in the form of a witness. He's  
14 leading on his direct.

15          MR. RICH: These numbers -- we're dividing  
16 numbers. I mean, it's not a big deal.

17          MR. SCHAEFFER: Well, it happens that you  
18 didn't establish the predicate of whether the  
19 accounting system is the same, which is something we  
20 discussed.

21          MR. RICH: Well, you can --

22          MR. SCHAEFFER: I know. But, I mean, it's

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1 not the proper way to ask a question.

2 CHAIRPERSON GRIFFITH: It's been asked and  
3 answered at this point, Mr. Schaeffer.

4 MR. SCHAEFFER: I withdraw the objection.

5 CHAIRPERSON GRIFFITH: We'll consider any  
6 further objections as you pose them.

7 BY MR. RICH:

8 Q You testified yesterday to Federal  
9 appropriations I believe for FY2000 now confirmed at  
10 \$300 million dollars, is that correct?

11 A I'm trying to recall if I was thinking it  
12 was '99 or 2000, but \$300 million is the right number.

13 Q Do you know, sir, how that appropriation  
14 relates to prior year appropriations dating back into  
15 the -- into prior periods?

16 A I believe -- well, if 2000 is \$300  
17 million, then '99 is \$275 million and '98 is \$250  
18 million, I believe.

19 Q Let me ask you to look at a page from Ms.  
20 Jameson's testimony which is to the rear of the direct  
21 testimony to see if that may refresh your recollection.  
22 Specifically page eight of Ms. Jameson's testimony.

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1 A Yes.

2 Q Do those figures comport, sir, with your  
3 recollection as to --

4 A I'm sorry, these --

5 Q -- where the \$300 million dollars fits in  
6 the historic pattern of appropriation?

7 A Well, they don't appear here so it must be  
8 FY2000.

9 Yes, as indicated in the footnote, the  
10 \$300 million is -- I'm not sure of the date of all of  
11 this, but --

12 Q Okay, let me finally ask you a couple of  
13 questions about a document which is in evidence as  
14 ASCAP 14X, the PBS 1997 Annual Report. If you could  
15 pull that out again, please.

16 And if you would specifically look at page  
17 two up at the top. Mr. Schaeffer read you certain  
18 excerpts from the financial highlights paragraph there.  
19 Do you recall?

20 A Yes.

21 Q And I'd like specifically to direct your  
22 attention to the statement toward the middle of that

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1 paragraph which says, "FY1997 operating revenue was up  
2 by almost \$32 million dollars over FY1996 due largely  
3 to growth in PBS's Learning Ventures activities such  
4 as PBS The Business Channel, PBS Home Video and the  
5 PBS Adult Learning Service."

6 Do you see that?

7 A I do.

8 Q Now to what extent are the identified  
9 activities there broadcast activities, to your  
10 knowledge?

11 A The Business Channel does not engage in  
12 any broadcast activities. PBS Home Video, by  
13 definition, is home video and not broadcast. The  
14 Adult Learning Service has both a broadcast and a  
15 satellite component.

16 Part of it is -- entails broadcast, but  
17 part of it is direct feed of college course ware from  
18 PBS directly to colleges bypassing any broadcast  
19 phase.

20 Q I have one last question on redirect.

21 In that same paragraph, Mr. Downey -- I'm  
22 sorry.

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1 A Yes.

2 Q Page two. There's a sentence that says,  
3 "The net effect was an increase in investments in  
4 future programming of \$18 million dollars, a 16%  
5 rise."

6 Do you see that?

7 A No. Where is that?

8 Q Down in that same paragraph, financial  
9 highlights, --

10 A Oh, yes.

11 Q -- the next to last sentence. The  
12 reference to investments in future programming of \$18  
13 million dollars. Do you see that?

14 A I'm just reading the --

15 Q Yes.

16 A Yes.

17 Q Can you put that number in the context of  
18 total PBS programming investments as well as system-  
19 wide programming investments?

20 A The PBS program budget for fiscal '97, if  
21 I'm not mistaken, was around \$120 million dollars or  
22 so -- or would have been otherwise. And this \$18

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1 million increased it to approximately \$140 million or  
2 \$138 million.

3 And that is -- that's the PBS portion of  
4 total program spending on national programs of \$300  
5 million. So PBS accounts for a little less than half  
6 of the total amount spent on national programs.  
7 Elsewhere, we discussed the total amount spent system-  
8 wide on programming by both local stations and through  
9 PBS, which was in the realm of \$670 million dollars.

10 So that -- getting back to your question,  
11 the \$18 million then is a relatively small proportion  
12 of all of the amounts spent on programming by all of  
13 the stations system-wide.

14 Q Thank you.

15 MR. RICH: I have no further questions.

16 CHAIRPERSON GRIFFITH: All right.

17 MR. SCHAEFFER: I have several.

18 CHAIRPERSON GRIFFITH: I had wondered why  
19 you had moved up here, Mr. Schaeffer.

20 MR. SCHAEFFER: Bad news, I guess.

21 CHAIRPERSON GRIFFITH: Go right ahead,  
22 please.

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## RECROSS EXAMINATION

MR. SCHAEFFER: I certainly hope to finish before lunch. I'm pretty sure I will.

I'd like to just mark for identification as ASCAP Exhibit 18X a copy of a little tombstone that appears or an article that appears in Current of March 2, 1998.

And you can give it to the witness.

I think it's 18, Your Honor.

CHAIRPERSON GRIFFITH: Okay, 18X.

(Whereupon, the above-mentioned document was marked as ASCAP Exhibit 18X for identification.)

MR. SCHAEFFER: If you would take a second to read this, Mr. Downey.

What would a day be without a Current article for me?

JUDGE DREYFUS: Are we reading outside the box or inside the box?

MR. SCHAEFFER: Outside the box. I said in the tombstone. I'm sorry.

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1 MR. KLEINBERG: Inside the box.

2 MR. SCHAEFFER: I'm sorry, inside. I'm  
3 sorry, inside the box. I'm sorry. I apologize.

4 One thing that hasn't changed is my  
5 confusion.

6 BY MR. SCHAEFFER:

7 Q Have you seen this before?

8 A No.

9 Q Okay. This is the same Ms. Bedford, I  
10 think, previously identified for us.

11 A Yes.

12 Q The first paragraph says that PBS's  
13 proposed financial -- fiscal 1999 budget sticks to a  
14 multi-year strategy to increase program spending by  
15 50% over four years while limiting stations' program  
16 dues to inflationary increases.

17 That's true, isn't it?

18 A Yes.

19 Q The second paragraph says that station  
20 dues comprised a smaller portion of PBS's total  
21 budget, 60% down from 75 in 1996.

22 That's true, isn't it?

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1 A Yes.

2 Q It is true also that PBS is seeking a five  
3 percent increase for member services and SIP fund  
4 raising specials.

5 A Right.

6 Q Those would -- is that correct?

7 A Yes.

8 Q And that SIP fund raising special with  
9 those pledges that we talked about yesterday, you have  
10 a special department. I think you testified yesterday  
11 that it's called SIP that promotes or buys that stuff  
12 for them.

13 Okay, then it says the total budget of  
14 nearly \$278 million dollars seeks \$126 million from  
15 stations and projects, \$93 million dollars in gross  
16 revenue from profit generating activities, and PBS  
17 predicts that strategic partners will invest \$21 in  
18 the National Program Service, almost as much as CPB's  
19 annual grant of \$22.5 million.

20 That's true also, isn't it?

21 A Yes.

22 Q Now when it says that strategic partners

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1 will invest \$21 million dollars in the National  
2 Program Service, that's for the PBS programs on the  
3 PBS feed and all that kind of thing?

4 A Yes.

5 Q And those strategic partners are some of  
6 the people you mentioned yesterday, I think; Reader's  
7 Digest -- I think you said Time-Warner, but I'm not  
8 sure. Can you remember any others in between now and  
9 --

10 A Reader's Digest, Warner Brothers Records.

11 Q Okay. And Warner Brothers Records is  
12 contributing to the programs?

13 A Yes.

14 Q Okay.

15 MR. RICH: May I interject objections  
16 here? I think the recross is on his own cross,  
17 certainly not on any redirect.

18 MR. SCHAEFFER: On the contrary, what was  
19 raised was that there was a much more constrained  
20 financial picture for PBS than we had brought out on  
21 cross, and I think it goes directly to that issue.

22 CHAIRPERSON GRIFFITH: The objection's

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1 overruled.

2 BY MR. SCHAEFFER:

3 Q Then it goes on to say, "PBS predicts that  
4 strategic partners will invest \$21 million dollars in  
5 the National Program Service." And I'm sorry, I  
6 repeated that.

7 And then Bob Ottenhoff, COO -- is that the  
8 chief operating officer of PBS?

9 A That is correct.

10 Q Says PBS is "very confident" that it can  
11 raise \$20 million dollars by forging new programming  
12 alliances despite the loss of Reader's Digest money.  
13 So you're making it -- Reader's Digest no longer  
14 contributed, is that right?

15 A Reader's Digest association has suffered  
16 some adverse consequences in its other business lines  
17 and, as a result, has pulled back on the relationship  
18 with PBS. It is not -- I wouldn't say it will  
19 necessarily fall to zero, but it's far less than we  
20 had earlier imagined.

21 Q And the next sentence says you're doing  
22 negotiating, and I do not wish to pry on your

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1 negotiations, and I'm going to leave that. I just  
2 assume what it says is true in the balance.

3 In other words, there are a number of very  
4 serious discussions. I don't want to get into that,  
5 but I assume that's true?

6 A As reported by this article, our goal is  
7 to increase by \$20 million dollars the amount of the  
8 National Program Service budget.

9 Q Well, and do you agree Ottenhoff says that  
10 the organization is very confident it will do that?

11 I don't want to pry into your negotiations  
12 because this is a public record, so I assume that's  
13 true.

14 A True that we're confident or --

15 Q Yes.

16 A We're confident, yes.

17 Q Okay. All right, and I assume the balance  
18 about PBS on line of \$1.9 million dollars and the  
19 Learning Venture division which includes home video,  
20 etc., all that is true, that there will be additional  
21 funds -- substantial due from that?

22 A Right.

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1 Q I assume that's true.

2 A Well, this is reporting revenues.

3 Q Yes, I assume that the article is  
4 substantially accurate?

5 A The article is substantially accurate.

6 Q Okay. And I assume we'll get to that  
7 subject a little later.

8 Now I want to shift to a slightly  
9 different matter. And I'm sorry if I jump around, but  
10 this is recross and I'm only going to try and confine  
11 myself to what happened on your redirect.

12 There was some discussion of formats on  
13 your redirect, and I think particularly some of the  
14 charts that appeared in -- I think it's PBS 3 or 4.  
15 Forgive me -- as always, I'm messed up.

16 But I think it was PBS -- correct me if  
17 I'm wrong -- 6.

18 Now in analyzing music use by formats, has  
19 PBS ever undertaken or, for that matter, the  
20 Corporation for Public Broadcasting the actual  
21 quantity of music that's used in a particular format?

22 MR. RICH: Objection; outside the scope of

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1 redirect. There were no questions along these lines  
2 whatsoever on redirect.

3 MR. SCHAEFFER: I believe there were  
4 references in the cross by Mr. Kleinberg. Now that  
5 that raised issues, I think it's perfectly legitimate  
6 recross to follow another -- I mean, I think that's  
7 the way the rule is.

8 CHAIRPERSON GRIFFITH: Anything further?

9 MR. RICH: I believe that, after however  
10 many hours yesterday, Mr. Schaeffer doesn't have to  
11 piggy back on Mr. Kleinberg's cross as a basis for  
12 recross. I think that the proper scope of it is to  
13 inquire into the areas I covered in the last half an  
14 hour to 35 minutes.

15 MR. SCHAEFFER: I don't know, maybe the  
16 practice is different in different courts, but I -- in  
17 Manhattan, I know in -- where I come from, it is the  
18 common practice.

19 CHAIRPERSON GRIFFITH: The objection is  
20 sustained.

21 MR. SCHAEFFER: I'll move on to another  
22 subject. I can't accept -- there were some questions,

1 I believe, that Mr. Rich then had raised about BMI 2X  
2 which is this article that you may recall.

3 THE WITNESS: I recall the article.

4 MR. RICH: I would again --

5 MR. SCHAEFFER: My recollection --

6 MR. RICH: Let me rise to object. I  
7 didn't raise any questions on redirect about that  
8 article.

9 MR. SCHAEFFER: Well, I would ask a  
10 question -- one question about the article. I don't  
11 know if -- I really honestly thought --

12 MR. RICH: If it's a question, I will --

13 CHAIRPERSON GRIFFITH: Let me hear the  
14 question.

15 MR. SCHAEFFER: All right, the question  
16 is, who would know more about music use in 1998 on PBS  
17 national programming, you or a gentleman who has got  
18 the job of director of drama, performance and the  
19 arts?

20 MR. RICH: I don't object to that.

21 THE WITNESS: Mr. DuBose would know more  
22 than I.

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1 MR. SCHAEFFER: Thank you.

2 You've testified, I believe, on direct --  
3 and again, my memory isn't as good as apparently I  
4 thought it was -- about studies that were done of --  
5 and which were included in the evidence you gave -- or  
6 PBS gave to this Panel.

7 Do you recall that? I believe I'm correct  
8 on -- that there was an exhibit --

9 MR. KLEINBERG: Would you be referring to  
10 the research notes?

11 MR. SCHAEFFER: Yeah, they were research  
12 notes, that's right.

13 THE WITNESS: So there is some CPB  
14 research --

15 MR. SCHAEFFER: That's what I said, yeah,  
16 that were done by CPB or PBS or one of the people in  
17 this case.

18 MR. RICH: I would object. There was no  
19 eliciting of testimony on redirect concerning that  
20 exhibit either.

21 MR. SCHAEFFER: Really? I thought that --  
22 that I'm pretty confident the record will bear me out.

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1 There was reference to the program information  
2 notebook, and I think Mr. Rich asked a couple of  
3 questions about that.

4 Am I incorrect? I just don't have the  
5 record so I don't know, but I thought he asked --

6 CHAIRPERSON GRIFFITH: Mr. Kleinberg cross  
7 examined on that.

8 MR. SCHAEFFER: I see, okay.

9 Well, I would ask some questions about  
10 that, but am I not to be permitted that?

11 MR. RICH: We would object.

12 CHAIRPERSON GRIFFITH: The objection's  
13 sustained.

14 MR. SCHAEFFER: I'm sorry, I apologize.

15 Would you -- well, let's talk about  
16 something that I know that we went into on cross, if  
17 I could find my document, and that was the guidelines.

18 Is that back there, Joan?

19 CHAIRPERSON GRIFFITH: 14X?

20 MR. RICH: 4X, Your Honor.

21 CHAIRPERSON GRIFFITH: Oh, here it is.

22 BY MR. SCHAEFFER:

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1 Q All right, I'll ask you -- I had some  
2 questions about the guidelines that I know Mr. Rich  
3 went over. Here they are.

4 If you'd put 4X -- because I was a little  
5 unclear about some of the matter.

6 You said that there's great emphasis on  
7 the fact that no viewer should think that advertisers  
8 influence the content of the shows, and that's a  
9 distinctive feature of public television broadcasting;  
10 is that correct?

11 A I would put it a different way.

12 Q Well, don't put it a different way. Is  
13 that -- do you regard --

14 A The emphasis --

15 Q -- one of the -- no, please put it my way,  
16 sir. I'm the questioner; you're the witness.

17 MR. RICH: I object. There's no  
18 requirement that the witness put it the examiner's  
19 way.

20 MR. SCHAEFFER: No, but there's no --  
21 there is a requirement that he answer the question.  
22 If he wants to answer a different question, you'll ask

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1 it for him.

2 CHAIRPERSON GRIFFITH: Can you respond to  
3 the question as it was asked, sir?

4 THE WITNESS: May I ask to repeat the  
5 question?

6 BY MR. SCHAEFFER:

7 Q Do you regard the requirement that there  
8 be an identification -- withdraw.

9 Do you regard the requirement that news  
10 programs not appear to be influenced by commercial  
11 advertisers as unique to public broadcasting?

12 A No.

13 Q In fact, when we watch 60 Minutes and  
14 20/20 and Dateline, it's pretty clear from watching  
15 that that the commercials do not -- the sponsors do  
16 not influence those programs, isn't that correct?

17 A Commercial programs don't have  
18 underwriters, so it's a different -- I mean, it's a  
19 different model, it's a different, you know, paradigm.  
20 I mean, I accept your assertion that they don't have  
21 influence over the content, but the relationship  
22 between the producer and the sponsor is different in

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1 commercial television.

2 Q You would regard a sponsor -- for example,  
3 how about -- I know a show called The Hallmark  
4 Playhouse, I think it's called. Is that a different  
5 -- that's not an underwriter in, you know, commercial  
6 television program --

7 A No, you asked me about news programs, so  
8 that's what I was referring to.

9 Q Well, do you regard, for example, 60  
10 Minutes, when it has advertisers who come and pay for  
11 the -- pay for minutes for their announcements on that  
12 broadcast, as not really paying for the broadcast?

13 A I'm sorry, now you've asked me a different  
14 -- we're on a different subject.

15 Could you repeat the question?

16 Q You distinguish -- yeah, we are because  
17 I'm puzzled.

18 In other words, an advertiser is different  
19 even though the advertiser pays money on a commercial  
20 program to defray -- to pay the expenses, the profits,  
21 the salaries, everything of the -- everything that  
22 costs money on a particular program, that's different

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1 than an underwriter in public television, sometimes  
2 called a sponsor, who pays money which is then used  
3 for the expenses and the salaries of public  
4 broadcasting programs, is that correct?

5 MR. RICH: Objection.

6 MR. SCHAEFFER: You do?

7 CHAIRPERSON GRIFFITH: He's answered. Do  
8 you want -- go ahead.

9 MR. SCHAEFFER: Okay.

10 CHAIRPERSON GRIFFITH: Do you want to  
11 answer?

12 THE WITNESS: I have an answer, yes.

13 CHAIRPERSON GRIFFITH: Do you object?

14 MR. RICH: I'll withdraw my objection.

15 CHAIRPERSON GRIFFITH: All right, go ahead  
16 and answer.

17 THE WITNESS: There are similarities there  
18 and very important differences. In public television,  
19 by and large -- well, no -- exclusively it's the  
20 producer who finds the underwriting. And so the  
21 producer delivers to PBS a package consisting of the  
22 program and the underwriting.

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1                   And PBS have no involvement in the under  
2                   -- in the producer's solicitation of that underwriter.  
3                   And so we have certain safeguards to ensure that  
4                   what's delivered to us meets with our standards.

5                   Now this is different from a commercial  
6                   network who has in one department producers making  
7                   programs and, in another department, an advertising  
8                   sales department selling commercial spots.

9                   And it's all conducted within the  
10                  framework of one corporation with, you know, obviously  
11                  a hierarchy of management and the exercise of  
12                  responsibilities. So that's a difference.

13                  And it is one of the reasons for this, you  
14                  know, fairly elaborate articulation of underwriting  
15                  guideline policies.

16                  BY MR. SCHAEFFER:

17                  Q       Is it your testimony that networks like  
18                  NBC and CBS do not review and regulate the content of  
19                  the shows that come out on their feeds?

20                  A       I don't think that's what I said. I said  
21                  --

22                  Q       Well, I don't know what you -- sir, I'm

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1       trying to find out what you did say.

2               What's the difference?

3               A       The difference is that PBS is a third  
4       party in the transaction, unlike a network who is --  
5       you know, who has control over both the selling of the  
6       advertising time and the production of the news  
7       program.

8               Q       So that's the difference between the  
9       hypothetical I gave you --

10              A       Well, that's a difference.

11              Q       Is there any other difference that's  
12       important? I understand you think that difference is  
13       significant. Others may disagree.

14              A       I think there are profound differences  
15       between public --

16              Q       Well, tell me what they are.

17              A       Well, as I've said before, public  
18       television, the emphasis is on the program, not on  
19       attracting large audiences for the purposes of selling  
20       advertising.

21              Q       Do you distinguish 60 Minutes or the news  
22       magazines that I've described, 20/20, as from

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1 Frontline in that respect?

2 A In terms of program content, there are  
3 high degrees of similarity; but we were talking here,  
4 I thought, about underwriting and these guidelines and  
5 why they're --

6 Q Well, I'm talking about who pays for the  
7 shows. Advertisers clearly pay for 60 Minutes. 60  
8 Minutes, you must agree, would not run if they didn't  
9 have advertisers, isn't that correct?

10 A That's correct.

11 Q Okay. And so the money that they get from  
12 advertising on -- CBS, I guess, carries 60 Minutes --  
13 in essence goes to paying for 60 Minutes and whatever  
14 profits the shareholders of CBS get, isn't that  
15 correct?

16 A That's correct.

17 And underwriters pay for PBS programs.  
18 And we have certain guidelines to ensure -- satisfy  
19 ourselves and our viewers of the relationship between  
20 the producer and the underwriter.

21 Q And what I'm saying to you, isn't it  
22 pretty clear that the news magazines on -- and the

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1 news, in fact, on national television also screens, to  
2 some extent, what is reported so it will not look like  
3 the advertisers are influencing the content, isn't  
4 that true?

5 Don't you know that in the broadcasting  
6 industry?

7 A I think that it's -- I don't know, to be  
8 honest with you.

9 Q You don't?

10 A I think it's --

11 Q Okay, you don't know. Fine.

12 Incidentally, when you even see Mad About  
13 You or Seinfeld on the national networks, is there  
14 anything that indicates or any danger that the  
15 sponsors particularly influence those situation  
16 comedies?

17 Is there any reason that we would think  
18 that?

19 A I don't believe that's the case, but I  
20 don't -- I can't --

21 Q Okay. Let's go back and let's look at a  
22 little more -- I think I got the right one -- some of

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1 the rules that are contained in 4X. Look at page 17.  
2 And there are some words that the FCC has found  
3 unacceptable which you're warning the local stations,  
4 right?

5 A Yes.

6 Q Okay. For example, delightfully honest;  
7 do you think it makes a difference if it says honest?

8 A Well, I have to be careful about context.  
9 That was the word cited in the Commission's letter of  
10 liability to a station, that it shouldn't have said  
11 delightfully honest.

12 And so I'm doing the best I can.

13 Q Okay, okay.

14 So what you're doing is reporting --  
15 you're reporting really what the FCC said should not  
16 be done?

17 A That's right.

18 Q It really isn't PBS that's announcing the  
19 policy; you're repeating certain words that were found  
20 inappropriate by the FCC?

21 A It's a literal transcript.

22 Q Okay, I understand that.

1 By the way, what is enhanced underwriting?

2 A Uh --

3 Q That's a term that's used in public  
4 broadcasting?

5 A Yes.

6 Q What does that mean?

7 A It's not a very precise term, but it has  
8 its origins in an experiment conducted by something  
9 called the Temporary Commission on Alternate  
10 Financing, or TCAF, which occurred in the early  
11 1980's.

12 And under that experiment, some ten public  
13 television stations, although only seven actually  
14 undertook the opportunity, actually ran commercials  
15 for a period of 18 months.

16 Literal TV commercials behaved in that  
17 respect, at least, as commercial stations for the  
18 purpose of ascertaining what the consequences might be  
19 of doing that on a more widespread fashion.

20 Meanwhile, some other -- one or two other  
21 stations elected not to go all the way to commercials,  
22 but to show more traditional underwriting

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1 announcements, but announcements that were more  
2 aggressive than what was then permitted by the FCC.

3 And the term of art used to describe that  
4 was enhanced underwriting. Again, it's not a very  
5 precise term, but that's how and where it came about.

6 Q Is it your understanding that some of the  
7 local television stations in public broadcasting are  
8 continuing forms of enhanced advertising?

9 A Well, --

10 Q I'm sorry, enhanced underwriting.

11 A A couple of years later, after this TCAF  
12 experiment, the Congress directed the Commission to  
13 amend its rules so that they were more permissive with  
14 respect to underwriting credits.

15 And the rules that the Commission now has  
16 in place allow what you might call enhanced  
17 underwriting.

18 Q Look at D on page 18. I'm not -- I'm a  
19 little confused about what this means. Does this mean  
20 that, on a particular announcement, an underwriter can  
21 say -- could identify its product?

22 A Yes.

1 Q And is that substantially different than  
2 -- withdrawn, okay.

3 But he can't mention more than one  
4 product; only one product?

5 A The PBS guidelines would limit you to  
6 identifying one product and up to three product lines.

7 Q I see. But --

8 A The Commission regulations don't impose  
9 that limitation.

10 Q I see. So if somebody mentioned two  
11 products and four product lines, it would be  
12 inconsistent. But if he mentions only one, he's okay  
13 under PBS guidelines?

14 A Yes.

15 Q Then I see product demonstrations. Under  
16 PBS's restrictions, you can actually identify how a  
17 product works by -- if you're an underwriter or a PBS  
18 sponsor?

19 A Yes.

20 Q When you say demonstrate a product, what  
21 do you mean?

22 A Well, for example, a kitchen appliance.

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1 You know, a food processor, for example.

2 Q I see.

3 A You could show it in operation.

4 Q And it says for these purposes, packaged  
5 goods such as food may be shown out of the package or  
6 container?

7 A Yes.

8 Q So you can show a piece of Wonder bread  
9 being taken out of the Wonder bread package, in other  
10 words?

11 A You could show that, yes.

12 Q Okay. And I take it in page 19, when you  
13 were talking about the restrictions on the use of  
14 people, if I have -- if I'm an automobile manufacturer  
15 -- say I'm Ford or Chrysler, I can show some happy or  
16 -- remember the old Tour the USA in a Chevrolet?

17 I don't know if everybody remembers that.  
18 I think you and I remember that.

19 You can show somebody behind the wheel  
20 going way high and Tour the USA in a Chevrolet --  
21 that's okay?

22 A No.

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1 Q I see. What's not okay?

2 A You started to say some happy person.  
3 That's exactly the problem here.

4 Q Yeah.

5 A I acknowledge that it would look very  
6 strange for a car again to be -- to have nobody  
7 driving it, so we'll allow a driver of a car. But  
8 they can't be shown in close up. They're not allowed  
9 to wave.

10 Q I see.

11 A No hair blowing in the wind. No  
12 beautiful, buxom models. All of that is not  
13 permitted.

14 Q But they can -- you can see the -- you can  
15 see the Chevrolet coming up to you with a smiling  
16 driver in the background coming closer?

17 A No; no smiling drivers.

18 Q The driver can't smile?

19 A Yes, that's correct.

20 Q Okay, all right, okay.

21 A We're trying to avoid a depiction of the  
22 happy consumer --

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1 Q Right, no happy faces.

2 A -- implying that this product is superior  
3 to some other product.

4 Q I see, no happy faces.

5 A You can show the product.

6 Q Okay. Now I noticed you can use jingles.

7 A Uh-huh.

8 Q That's on page 21. And those are -- it  
9 says a jingle. What do you understand a jingle to be?

10 A A piece of music that is associated with  
11 a particular company.

12 Q Okay. So, for example, Tour the USA in a  
13 Chevrolet, you might not use the lyrics; you'd just to  
14 the tune?

15 A We might.

16 Q Yeah, okay. And --

17 A So long as the overall effect preserves  
18 the noncommercial character of the announcement.

19 Q And in fact, if NBC chose to be on PBS,  
20 you might have the famous NBC blah, blah, blah,  
21 whatever that is, right?

22 A I'd have to think about that.

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1 Q Yeah, well, what would the objection be?  
2 It's not a lyric.

3 A I'd have to think about that.

4 Q Okay. But the local TV station,  
5 notwithstanding your thinking about it, could assume  
6 that that was okay?

7 A Probably okay. It's a little unusual in  
8 that NBC and other broadcasters --

9 Q Well, you've never -- how many times have  
10 you gone to local stations and told them they're  
11 messing up and they're not performing what they're  
12 supposed to be doing under these rules?

13 A Never.

14 Q Oh. Never?

15 A Local stations come to us for guidance,  
16 and we provide it as requested. But we are not -- we  
17 are not compliance officers of local stations.

18 Q So that, in point of fact, if the local  
19 station said I don't care, nothing would happen?

20 A That is correct.

21 Q It's precatory?

22 A That's correct.

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1           Q     In fact, if they don't have it on their  
2 files, they don't even know what happens?

3           MR. RICH:   Objection.

4           THE WITNESS:  I'm sorry, I don't know what  
5 you mean by files.

6           MR. SCHAEFFER:  Okay.

7           CHAIRPERSON GRIFFITH:  Sustained.

8           BY MR. SCHAEFFER:

9           Q     Let's move on to something besides the  
10 precatory rules.

11           MR. RICH:  May I move to strike that last  
12 ubiquitous comment?

13           MR. SCHAEFFER:  Yeah, okay; where's my  
14 letter?

15           CHAIRPERSON GRIFFITH:  All right.

16           MR. RICH:  Can I get a ruling before Mr.  
17 Schaeffer shouts over me?

18           MR. SCHAEFFER:  I'll withdraw it.

19           CHAIRPERSON GRIFFITH:  It's stricken.

20           MR. SCHAEFFER:  I'll withdraw it.

21           MR. RICH:  Thank you.

22           MR. SCHAEFFER:  Would you put in front of

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1 the witness 17X?

2 Now I asked you some questions about this  
3 yesterday, but I'm -- and one question I'm going to  
4 repeat because I didn't seem to understand from your  
5 questioning by Mr. Rich if you're disaffirming it, and  
6 I just want to make sure that this letter for Congress  
7 is not being disaffirmed.

8 MR. RICH: I object. I did not ask him  
9 any questions about this letter or whether he was  
10 disaffirming this letter.

11 MR. SCHAEFFER: You asked about national  
12 programming. You asked a lot about national  
13 programming.

14 MR. RICH: You could probably -- I asked  
15 him about PBS and that word appears here too, Your  
16 Honors, but that's not the issue.

17 MR. SCHAEFFER: Well, there's a statement  
18 here PBS's future is directly tied to its programming,  
19 "our national programming enjoying extraordinary  
20 successes in 1997." I want to find out if that's  
21 still his opinion.

22 CHAIRPERSON GRIFFITH: Do you object?

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1 MR. RICH: Mr. Schaeffer's all over the  
2 lot. He asked if -- the predicate, I thought, for his  
3 question was whether he was "disavowing" this letter,  
4 which I think would be well outside the scope of my  
5 redirect.

6 MR. SCHAEFFER: No, disavowing this  
7 paragraph.

8 JUDGE GULIN: All right, we'll strike the  
9 introductory clause.

10 MR. SCHAEFFER: Okay.

11 JUDGE GULIN: And re-ask the question.

12 MR. SCHAEFFER: Are you disavowing that  
13 which was said and reported to Congress in  
14 justification of the bonuses which appears as the  
15 third bullet point on page three?

16 CHAIRPERSON GRIFFITH: Any objection?

17 MR. RICH: May I -- I just want to read  
18 it.

19 CHAIRPERSON GRIFFITH: All right.

20 THE WITNESS: The third bullet point on  
21 page three?

22 MR. SCHAEFFER: Yes.

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1 THE WITNESS: We didn't discuss that  
2 yesterday.

3 MR. SCHAEFFER: Yes, we did. I asked --

4 CHAIRPERSON GRIFFITH: Just a moment.

5 THE WITNESS: We discussed the first  
6 bullet on page two.

7 MR. RICH: Whether or not it was discussed  
8 yesterday, Your Honors, it certainly wasn't discussed  
9 on redirect today.

10 MR. SCHAEFFER: Well certainly national  
11 programming was.

12 CHAIRPERSON GRIFFITH: It was.

13 JUDGE GULIN: Let me read the --

14 CHAIRPERSON GRIFFITH: Yes.

15 JUDGE GULIN: We're talking about the last  
16 bullet --

17 MR. SCHAEFFER: On page three.

18 JUDGE GULIN: Page three.

19 THE WITNESS: I'm sorry, are you waiting  
20 for me to --

21 MR. SCHAEFFER: I'm asking is the --

22 CHAIRPERSON GRIFFITH: No, wait just a

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1 minute. There's an objection pending.

2 Do you have any comments to make?

3 JUDGE DREYFUS: The objection is based on

4 --

5 MR. RICH: Outside the scope of redirect.

6 JUDGE DREYFUS: -- outside the scope of  
7 redirect?

8 MR. RICH: Yes, sir.

9 JUDGE DREYFUS: Is it your position that  
10 he -- that the subject matter of this bullet point was  
11 brought up on redirect?

12 MR. SCHAEFFER: Yes.

13 JUDGE DREYFUS: The subject --

14 MR. SCHAEFFER: They discussed the  
15 financial constraint on national programming. It's my  
16 last question.

17 CHAIRPERSON GRIFFITH: By a vote of two to  
18 one, the objection is overruled.

19 BY MR. SCHAEFFER:

20 Q You don't contest the truth of the bullet  
21 point that appears -- the third bullet point that  
22 appears on page three?

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1           A       No, I don't contest the truth of it.

2           Q       And in fact, one of the reasons for the  
3 station equity model by which your partnering of the  
4 business enterprises in using the programs that you  
5 are acquiring which include music as a way of getting  
6 revenues is designed to increase the revenues of PBS  
7 because it fears that there will be a decline in  
8 future contributions and pledges and Federal funding,  
9 isn't that true?

10           MR. RICH:   Objection.   Mr. Schaeffer  
11 represented he had but one question on this document.

12           MR. SCHAEFFER:   Oh, come on.

13           CHAIRPERSON GRIFFITH:   He can go ahead and  
14 pursue.

15           Go ahead, if you wish.

16           Can you answer that question, sir?

17           THE WITNESS:   I would answer this way.  
18 The essential reason for the station equity model was  
19 to relieve the burden on our stations of increasing  
20 the funds available for National Program Service.

21           BY MR. SCHAEFFER:

22           Q       I think you may have misspoke.   Can I hear

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1       that --

2               A       The essential reason for the station  
3 equity model was to relieve the burden of increases  
4 coming from our member stations. In other words, it  
5 enabled our member stations' contributions to the  
6 National Program Service to remain basically flat plus  
7 an adjustment for inflation.

8               Q       In other words, you feared that the  
9 revenues that were going to be achieved by your  
10 stations from the Federal Government, from  
11 contributions, from pledges, from all the many, many  
12 fund raising activities that they engage in might not  
13 be enough for them in the future, isn't that true?

14              A       No. Well, I -- no.

15                    As I've said numerous times, all of the  
16 economic indicators are basically flat. But our  
17 stations agree that it's important to continue to  
18 invest whatever we can in national programming.

19                    To the extent the stations are enjoying  
20 some level of growth, they are investing it in things  
21 other than national programming in part in order to  
22 strengthen their -- the value of -- strengthen the

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1 audience's perceived value of the station in the  
2 community by providing things like outreach or doing  
3 more local programming.

4 Q Well, but these things that the station  
5 equity model are engaging in are producing profits,  
6 aren't they?

7 A No, they're producing programs.

8 Q Aren't they also producing a lot of money?  
9 Mr. Duggan says so. They're producing a lot of  
10 additional revenue for PBS and for the public  
11 broadcasting industry. Isn't that clear from  
12 everything we've seen?

13 A Well, we talked about \$18 million dollars  
14 which is invested in programs. It's not dollars that  
15 are, you know, passed out amongst the stations or  
16 something.

17 MR. SCHAEFFER: I'll stand on the  
18 documents that are already in -- okay, I have no  
19 further questions.

20 CHAIRPERSON GRIFFITH: All right.

21 Mr. Kleinberg, you do not have any cross  
22 examination?

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1 MR. KLEINBERG: I do not.

2 CHAIRPERSON GRIFFITH: Thank you.

3 MR. RICH: One remaining question, if I  
4 may.

5 CHAIRPERSON GRIFFITH: Mr. Rich.

6 REDIRECT EXAMINATION

7 BY MR. RICH:

8 Q Mr. Downey, you testified in response to  
9 Mr. Schaeffer that there came a time when the Congress  
10 effectively instructed the FCC to expand a bit the  
11 latitude for underwriting guidelines, is that right?

12 A That's correct.

13 Q What year was that approximately, to your  
14 recollection?

15 A 1984.

16 MR. RICH: I have no further questions.

17 CHAIRPERSON GRIFFITH: All right.

18 May this witness be excused?

19 MR. SCHAEFFER: As far as I'm concerned.

20 MR. RICH: Thank you, yes.

21 CHAIRPERSON GRIFFITH: Mr. Downey, sir,  
22 you are free to go.

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1 THE WITNESS: Thank you.

2 (Laughter.)

3 (The witness was excused.)

4 CHAIRPERSON GRIFFITH: Wasn't there a song  
5 called Free at Last?

6 We'll take our lunch and recess. I'll ask  
7 that you come back at 2:00, please.

8 MR. SCHAEFFER: Mr. Jabelow is next?

9 MR. RICH: Yes.

10 (Whereupon, the proceedings recessed for  
11 lunch at 12:55 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (2:05 p.m.)

3 CHAIRPERSON GRIFFITH: All right, ladies  
4 and gentlemen. Mr. Rich, are you ready, sir?

5 MR. RICH: Yes. Just one housekeeping  
6 matter, if I may.

7 CHAIRPERSON GRIFFITH: Yes.

8 MR. RICH: In response to a question posed  
9 by Your Honor yesterday as to the status of the  
10 paperwork, withdrawing the motion to strike certain  
11 testimony by Dr. Boyle, --

12 CHAIRPERSON GRIFFITH: Yes.

13 MR. RICH: -- I want to tender to the  
14 Panel copies of a stipulation which has now been  
15 entered into among the parties reflecting the  
16 conditions and circumstances happily agreed to between  
17 the parties, based on which the motion is withdrawn.

18 CHAIRPERSON GRIFFITH: All right. Thank  
19 you. For the record, I'll simply mark this as  
20 "Received" today, then.

21 MR. RICH: Thank you.

22 And with the Panel's permission, we would

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1 call as our next witness Peter Jablow.

2 CHAIRPERSON GRIFFITH: All right. Mr.  
3 Jablow, if you'll raise your right hand, please, sir?  
4 Whereupon,

5 PETER JABLOW  
6 was called as a witness by counsel for the Public  
7 Broadcasters and, having been first duly sworn,  
8 assumed the witness stand, was examined, and testified  
9 as follows:

10 CHAIRPERSON GRIFFITH: Thank you.

11 DIRECT EXAMINATION

12 BY MR. RICH:

13 Q Mr. Jablow, would you state your name for  
14 the record, please?

15 A Peter Jablow.

16 Q And by whom are you employed?

17 A National Public Radio.

18 Q What is your current position at NPR?

19 A I'm the Executive Vice President and Chief  
20 Operating Officer.

21 Q For how long have you held that position?

22 A Three years.

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1 Q What are the responsibilities that  
2 position entails?

3 A I oversee the day-to-day operations of the  
4 company, which includes all of the outputs and the  
5 basic operations of NPR.

6 Q And would you briefly describe your  
7 principal job experiences before joining NPR three  
8 years ago?

9 A Yes. I came to Washington. I'll sort of  
10 trace it in two different ways. I came to Washington  
11 in 1978 to become the first Executive Director of a  
12 nonprofit trade association for the arts and  
13 entertainment industry: the Cultural Alliance. I did  
14 that for five years.

15 And after that, I went to work for Abe  
16 Pollin, a gentleman who owns the Washington Capitals  
17 and the Washington Wizards and now called the MCI  
18 Center.

19 And through my background in the arts and  
20 entertainment industry, I got Mr. Pollin involved in  
21 the ticketing business, commercial ticketing business.  
22 And I ran the Mid-Atlantic franchise for the

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1 Ticketmaster operation, which he owned the license  
2 for. And ultimately we along with some venture  
3 partners bought Ticketron nationally. And I became  
4 the President and CEO of Ticketron.

5 Once we sold that company, I went and  
6 established my own consulting business in the  
7 communications and entertainment field for a number of  
8 years. National Public Radio was one of my clients.  
9 I ended up becoming the COO.

10 Prior to that, I worked in Boston in the  
11 arts and entertainment, nonprofit arts and  
12 entertainment, area as well.

13 Q I was going to ask you about some prior  
14 involvement I believe you had with a variety of  
15 cultural organizations.

16 A Well, I've always had an involvement with  
17 cultural organizations from my days in Boston through  
18 my days now in Washington. I'm the Chairman of the  
19 Board of the Roundhouse Theatre Company. I'm the  
20 Treasurer of the Washington Theatre Awards Society,  
21 the Helen Hayes Awards.

22 Before that, I was President of the Woolly

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1 Mammoth Theatre. And in Boston, I was involved  
2 similarly in the theatre community in the nonprofit  
3 cultural world.

4 Q What is your educational background?

5 A I have an undergraduate degree from the  
6 University of Pennsylvania in psychology and a  
7 graduate degree from Boston University in broadcast  
8 journalism.

9 Q Do you, sir, have an understanding as to  
10 the level of increase over previously negotiated  
11 license fees which are being sought by ASCAP and BMI  
12 in this proceeding?

13 A Yes, I do.

14 Q What is your reaction to the level of  
15 those fee requests?

16 A Music is one element of what we at NPR and  
17 what Public Radio provides. It's an important  
18 element. But it's part of a larger mix. And there  
19 has been no material change in our use of music over  
20 the past five years. In fact, -- and I can speak  
21 specifically for NPR and the Public Radio industry --  
22 there has been a great deal of format shifting.

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1           Indeed, formats in Public Radio are  
2           shifting away from musical formats towards more news  
3           talk. A number of stations have changed their format  
4           in the past few years.

5           At the same time, our -- the budgets for  
6           program expenditures have been basically very flat, if  
7           not reduced, in some cases. So in general, I,  
8           frankly, was astonished by the request from the  
9           Societies. And I think that any call for a  
10          substantial increase is ludicrous.

11          Q       What is the overall mission of Public  
12          Radio, Mr. Jablow?

13          A       To provide programming which educates and  
14          informs, culturally enriches the general public; quite  
15          frankly, to create a more informed public. That is  
16          our mission. And we do that in partnership with our  
17          member stations.

18                 JUDGE DREYFUS:       Excuse me for  
19          interrupting. One second, counsel. I cannot find the  
20          year in your direct testimony when you joined NPR.  
21          And I was waiting for you to say it, and you never  
22          said it.

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1 So I'm sorry. What was that year?

2 THE WITNESS: It was 1995.

3 JUDGE DREYFUS: Okay. Thank you.

4 BY MR. RICH:

5 Q Are you familiar with the concept called  
6 "universality of service"?

7 A Absolutely.

8 Q Does that have applicability to Public  
9 Radio?

10 A Very much so. We are mandated by Congress  
11 to provide as universal a service as possible.  
12 Indeed, Public Radio reaches approximately 97 percent  
13 of the American public and is in some areas of this  
14 country, specifically some significantly rural areas,  
15 the only form of communication.

16 Q In fulfilling the mission you describe,  
17 how, if at all, is the programming of Public Radio  
18 similar to or different than that of its commercial  
19 counterparts?

20 A It's significantly different.

21 Q How so?

22 A In a number of ways. And if I go on too

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1 long, tell me. We don't produce any program because  
2 it's commercially viable. We produce programming  
3 because we think it's in the best interest of the  
4 American public, because it's something we feel is  
5 needed and what we want to do.

6 And I'm going to break it down by format  
7 now if that's all right. Our news magazines, Morning  
8 Edition and All Things Considered, are not done in a  
9 format that would be in the least commercially viable.  
10 It's what's called long form news.

11 We will talk and sometimes have heard  
12 people talking too long on subjects to provide  
13 in-depth, detailed coverage and analysis. We will  
14 cover subjects in our news magazines and on our air  
15 that make the public in some cases very uncomfortable.  
16 These are not subjects that are necessarily those that  
17 people wouldn't want to hear on radio, but once we  
18 engage them, they stay with us and listen.

19 We've done a series recently on death and  
20 dying in America. For 52 weeks, we're going to be  
21 running bits and pieces about how people deal with  
22 death and dying and grief.

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1                   We are starting a series in May called  
2 Beyond Affliction: The Disability History Project;  
3 again, not a light, humorous subject but a subject  
4 that we feel is important and will clearly provide a  
5 service to the American public.

6                   On the music side of the ledger, we don't  
7 produce music because it makes money for us. In fact,  
8 it doesn't at all. It's not wallpaper. We ask people  
9 to invest in their listening. We don't ask them just  
10 to listen. They have to invest their time.

11                  We provide music to the American public  
12 because it's culturally enriching. It's our mandate.  
13 We, in fact, do a great deal of programming that you  
14 will find nowhere else on the radio dial.

15                  We do a form of jazz that you will not  
16 find on a commercial station. We do Celtic music.  
17 We'll do a wide variety of music that it would be hard  
18 to attach a dollar value to it, but it's something  
19 that's important and appeals to a certain niche.

20                  Q       Let's talk a little bit about NPR's  
21 function in the Public Broadcasting system. What  
22 functions does NPR perform?

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1           A       We are very different from our close  
2 friends at PBS. We produce, acquire, and distribute  
3 programming for the Public Radio system. The majority  
4 of what we have -- the majority of what we do and what  
5 we have developed a reputation for is the programming  
6 that we produce. About 65 percent of our programming  
7 is news talk-based. About 35 percent is  
8 cultural-based.

9                   Our programming is what we call -- is  
10 really the guts of the Public Radio system. Our news  
11 magazines, Morning Edition and All Things Considered,  
12 are there at drive time and are -- even though both  
13 programs are two hours in length, in many markets, you  
14 will find them rolled over so that they're on for six  
15 hours in some major markets around this country. That  
16 is the guts and the core of the Public Radio system.

17                   And I guess one example of that is the  
18 fact that though our programming represents  
19 approximately 25 percent of the Public Radio program  
20 schedule, it represents a little more than 50 percent  
21 of the listening.

22           Q       By "Public Radio schedule," you mean hours

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1 of actual broadcast time?

2 A That's correct. That's correct.

3 Q By 50 percent of the listenership?

4 A That is correct.

5 Q Measured how?

6 A Time spent listening.

7 MR. SCHAEFFER: Is that in the direct?

8 THE WITNESS: Yes, it is. The -- we are  
9 also a membership organization. We have approximately  
10 600 members, but that is not all of the CPB-funded  
11 Public Radio stations. There are about approximately  
12 100 more Public Radio stations. I think there are  
13 almost 700 Public Radio stations.

14 BY MR. RICH:

15 Q Can you tell me a little about the  
16 composition of NPR's member stations?

17 A They range from stations in major markets  
18 that are fairly substantial in size to the smallest,  
19 tiniest Ma and Pa shop in a rural area. They are  
20 spread all over the country and have -- represent all  
21 levels of sophistication.

22 And they also represent a variety of

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1 formats of programming, from classical to classical  
2 news to news talk to jazz to AAA, which is another  
3 format which refers to adult acoustic contemporary  
4 music.

5 It's a great diversity. I think it's very  
6 reflective of the American public, which we serve.

7 Q You mentioned there are, did you say,  
8 about 100 stations which are noncommercial educational  
9 Public Radio stations which are not NPR members?

10 A That's correct.

11 Q Do you have an understanding whether those  
12 entities are as well-represented in the instant  
13 proceeding?

14 A I believe they are.

15 Q And if you would take a quick look at PB  
16 Exhibit 1, please, in the booklet that's in front of  
17 you? I would ask you if you're able to confirm that  
18 the listing beginning midway through, which is labeled  
19 "CPB-Qualified Public Radio Grantees and Stations"  
20 reflects as of the commencement of this proceeding a  
21 list of all CPB-qualified radio stations, to the best  
22 of your knowledge.

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1           A       To the best of my knowledge, it does.

2           Q       Now, of these 600 or so NPR member  
3 stations, Mr. Jablow, are they all fully functioning  
4 stations in the manner in which we think of radio  
5 stations?

6           A       No.

7           MR. SCHAEFFER: Is this in the direct, Mr.  
8 Rich?

9           MR. RICH: If I may, I guess I'm a little  
10 puzzled. Early on in the ASCAP and BMI case, I think  
11 we only did and Mr. Schaeffer even indeed said that  
12 minor deviations from literal text wouldn't be the  
13 subject of anything unless a major study was put in.

14           I'm simply augmenting by a factor that is  
15 so noncontroversial. You know, I don't know what else  
16 to say.

17           MR. SCHAEFFER: It's pretty controversial,  
18 Mr. Rich, because we didn't have the opportunity to  
19 take discovery of the contentions you're now going to  
20 make as to what the relative size was of the stations  
21 that NPR is representing here.

22           And it is more than a slight diversion

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1 because I have no doubt if I could have asked for  
2 discovery based on that, I could have shown that many  
3 of the stations we're talking about are very, very  
4 large and competitive, as Mr. Unmacht said.

5 So I do object, and I do regard this as a  
6 significant diversion. But it's not at all anywhere  
7 in the direct. And it's, in effect, a mousetrap, I  
8 think, what they're putting in now.

9 MR. RICH: I'm doing nothing about station  
10 size or economic wherewithal. I'm simply attempting  
11 to elicit, if you were to allow the witness to answer,  
12 the fact that there is a rather significant component  
13 of these total stations which have a rather passive  
14 role in the system at some point in the question and  
15 the answer.

16 I really do find trouble with -- because  
17 I moderated greatly my objections during the ASCAP and  
18 BMI presentations on the explicit representations of  
19 Mr. Schaeffer and Mr. Kleinberg that nobody was going  
20 to be literal in this proceeding in holding their  
21 witnesses to direct lines.

22 Mr. Boyle went off on any number of

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1 tangents. And I hold my tongue on the expectation of  
2 some modest degree of reciprocity.

3 MR. SCHAEFFER: I have been reciprocal in  
4 many of these questions you asked other witnesses. I  
5 don't think you should debate this. The point is it's  
6 not in the direct, and this could have been the  
7 subject of discovery as an important area, namely how  
8 these stations functioned.

9 Now for the first time I'm being faced  
10 with questions on that subject.

11 JUDGE GULIN: It's a material  
12 supplementation of the --

13 MR. SCHAEFFER: I regard it as a material  
14 issue.

15 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do  
16 you have a position, sir, on this?

17 MR. KLEINBERG: I don't have a position.

18 MR. SCHAEFFER: There's not even a call  
19 letter.

20 CHAIRPERSON GRIFFITH: The objection is  
21 overruled.

22 MR. RICH: Thank you.

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1 BY MR. RICH:

2 Q Can you respond to whether there is some  
3 segment of the station population, namely the member  
4 station population, that functions in less than a  
5 fully sort of operating sense?

6 A Yes. The 600-member station, a number of  
7 members of NPR, is a little bit misleading. Yes,  
8 there are 600 members, but of that 600, approximately  
9 half are what we call full members, those which have  
10 staff, our licensees, and fully operate a radio  
11 station.

12 The other 300 are what we refer to as  
13 repeaters or translators, which is stations that  
14 operate -- in repeaters, they're on the same frequency  
15 as the broadcast station repeating that original  
16 signal.

17 And other stations might be on a different  
18 signal, but they are also repeating the original  
19 signal of the parent station. And those are what we  
20 call translators.

21 MR. SCHAEFFER: I renew my objection.

22 CHAIRPERSON GRIFFITH: Do you have more

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1 questions in this area?

2 MR. RICH: I'm finished with my questions  
3 in this area.

4 CHAIRPERSON GRIFFITH: Okay. We've ruled  
5 on that, and the testimony will stand on that issue.  
6 Go ahead to your next question.

7 MR. SCHAEFFER: Can I be at least allowed  
8 some discovery on this subject, which is new to us?

9 CHAIRPERSON GRIFFITH: Well, let's wait  
10 until you've had the opportunity to cross-examine, Mr.  
11 Schaeffer.

12 MR. SCHAEFFER: I'm reluctant to  
13 cross-examine in an area that I don't know what I'm  
14 getting into. And without discovery, now I really  
15 have been mousetrapped.

16 CHAIRPERSON GRIFFITH: Well, let me just  
17 inquire about one thing of the witness. In your  
18 direct testimony on Page 4, you refer to 691 Public  
19 Radio stations supported with CPB funding, of which  
20 594 are members of NPR.

21 Is that you're trying to tell us now that  
22 over half of these are not -- these figures -- excuse

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1 me; let's go back onto Page 4 -- are accurate. Is  
2 that correct?

3 THE WITNESS: That is correct, yes.

4 CHAIRPERSON GRIFFITH: And you're  
5 indicating now that only half of those are what you  
6 would call full members?

7 THE WITNESS: They're full dues-paying  
8 members. The other stations might be affiliates of  
9 theirs, which are simply rebroadcasting the majority  
10 of what the full member is broadcasting.

11 CHAIRPERSON GRIFFITH: But they belong to  
12 your organization?

13 THE WITNESS: Correct. They belong to us  
14 as affiliates as well.

15 CHAIRPERSON GRIFFITH: And they pay  
16 membership dues and so forth?

17 THE WITNESS: A distinctly lower amount.

18 CHAIRPERSON GRIFFITH: Okay.

19 JUDGE GULIN: I'm not sure what's before  
20 us right now. A request for discovery?

21 MR. SCHAEFFER: Well, I don't know. I  
22 don't know how to handle this in the context of this

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1 hearing. Suddenly I've been surprised with a new fact  
2 which I believe if I had been allowed a little  
3 discovery, I could show that this formatting suddenly  
4 is something new. And I can't cross-examine because,  
5 in effect, who knows what thicket I'm going to be  
6 getting into.

7 I thought that was the purpose of the rule  
8 so that I would know what the issues were and I could  
9 take discovery about it before I came to this hearing.  
10 Now I can't.

11 CHAIRPERSON GRIFFITH: All right. Mr.  
12 Rich?

13 MR. RICH: This is not about formatting.  
14 This is a simple fact to put in context a number. All  
15 of the financial data related to Public Radio as ASCAP  
16 has felt relevant have been presented in its direct  
17 case.

18 CHAIRPERSON GRIFFITH: Why wasn't it  
19 included in the direct testimony?

20 MR. RICH: Your Honor, I can only give you  
21 the most honest answer, which is as one sits, as I'm  
22 sure happens with my colleagues and scopes out a

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1 direct, the gentleman says to you "Well, I think it  
2 should be pointed out the following." I said, "Look,  
3 that would be useful to point out to the Panel."

4 With all respect to Mr. Schaeffer, this is  
5 not central to anybody's case.

6 JUDGE DREYFUS: How do you see the impact  
7 of that on the question before us? What's the impact  
8 on rates, for example, of this information?

9 MR. RICH: It has no direct bearing on our  
10 case in terms of the economic model we proffer. Nor,  
11 to my knowledge, does it on the models that ASCAP or  
12 BMI proffers. Again, I think putting a frame on what  
13 the dynamics of the industry are so that when one  
14 hears a number of 600 stations, one recognizes, as I  
15 have now learned, that there is some subset of  
16 stations which functions on a more limited basis in  
17 terms of original programming initiatives. I thought  
18 a useful fact of --

19 CHAIRPERSON GRIFFITH: And you do not  
20 intend to argue that this will affect our decision in  
21 any way in determining the rate which we ultimately  
22 determine --

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1 MR. RICH: Based on my present knowledge  
2 of the ASCAP and BMI case, no, sir.

3 MR. SCHAEFFER: I made the argument -- and  
4 it was a fairly important argument -- that the ability  
5 to pay was relevant. You may recall we submitted a  
6 chart that showed what the cost would be to each radio  
7 station and each television station of the ability to  
8 pay.

9 Now, I also made another suggestion. I  
10 said we might key it to the ability to revenues and  
11 that that might be a fairer way to do it and it would  
12 be okay with me and maybe that is another way.

13 But that whole subject now is really open  
14 because I really don't know what I'm going to do to  
15 buttress that argument since I have no longer any  
16 right of discovery. And I would have had the right if  
17 they had put this in the original direct testimony.

18 CHAIRPERSON GRIFFITH: Right. Let me just  
19 confer about one thing.

20 (Whereupon, the Panel conferred off the  
21 record.)

22 CHAIRPERSON GRIFFITH: It's the opinion of

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1 the Panel at this time that what has been elicited --  
2 and we understand that this is the last of what you're  
3 going to discuss in this area -- is not a material  
4 deviation from the direct testimony. Therefore, the  
5 objection is overruled.

6 MR. RICH: Thank you, Your Honor.

7 BY MR. RICH:

8 Q Mr. Jablow, you mentioned several of NPR's  
9 leading news and information programs, I believe,  
10 Morning Edition and All Things Considered?

11 A Uh-huh.

12 Q On the culture side of the programming  
13 ledger, what would you identify as some of the more  
14 significant NPR programming initiatives?

15 A NPR programs or --

16 Q Let's just do NPR for the moment.

17 A NPR? The programs that we produce  
18 include: Performance Today, which is a daily  
19 classical show; Jazz Profiles, which is a completely  
20 jazz show. There are a number -- those are primarily  
21 the ones we produce. There are a number that we  
22 acquire.

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1                   The best known program, which is  
2                   classified as a cultural program, is Car Talk, which,  
3                   frankly, is far from cultural, but that's where we put  
4                   it.

5                   Q       Can you describe the general content of  
6                   Car Talk?

7                   A       It's very difficult. It is two extremely  
8                   well-educated Bostonian Ph.D.'s from M.I.T. parsing  
9                   out automobile advice to the public that calls, but  
10                  it's, quite frankly, much more the metaphor for advice  
11                  on living and life in America.

12                  Q       Were there others you wanted to identify?

13                  A       A Prairie Home Companion is a well-known  
14                  cultural show that is distributed by Public Radio  
15                  International. It's appropriate here that NPR is the  
16                  largest producer, acquirer, and distributor of  
17                  programming in the Public Radio system, but there are  
18                  others.

19                           Public Radio International is one.  
20                  Independent producers can distribute programs  
21                  themselves. And stations that produce programs can  
22                  distribute them themselves as well.

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1                   There are a number of other -- one of the  
2                   best known -- our Celtic show that we put on is called  
3                   the Thistle and Shamrock. Jazz Piano With Marion  
4                   McPartland is another well-known show.

5                   Another -- there are a bunch of news and  
6                   information shows that I haven't mentioned, but the  
7                   Diane Rehm Show, Fresh Air. They make up, again, the  
8                   substance of the Public Radio system, national program  
9                   delivery.

10                  Q           With reference to your written testimony  
11                   at Page 7, can you tell the Panel, please, what has  
12                   been happening to Public Radio's programming mix over  
13                   the past decade?

14                  MR. KLEINBERG: Could I just -- it's not  
15                   an objection but just an inquiry so the record is  
16                   clear. Bruce, when you say "Public Radio," are you  
17                   talking about NPR or --

18                  MR. RICH: I was going to attempt to  
19                   clarify that right now with the witness.

20                  MR. KLEINBERG: Okay. Because it's  
21                   getting a little --

22                  MR. RICH: Yes.

1 BY MR. RICH:

2 Q For purposes of this question, Mr. Jablow,  
3 I'm asking you not merely to focus on NPR-generated or  
4 distributed programming but programming system-wide.  
5 First question: Do you understand the chart appearing  
6 at Page 7 to be depicting system-wide program mix  
7 data?

8 A Yes, I do.

9 Q Okay.

10 MR. SCHAEFFER: Now I'm confused. Were we  
11 talking before this just about NPR, as opposed to  
12 Public Radio stations?

13 MR. RICH: We were talking about what the  
14 witness was talking about. At times he said these  
15 were NPR-produced programs, at times they were  
16 NPR-distributed programs.

17 MR. SCHAEFFER: Okay.

18 BY MR. RICH:

19 Q Do you have the question in mind, Mr.  
20 Jablow?

21 A Yes. I believe the question was: What  
22 does this chart on Page 7 reflect --

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1 Q Yes.

2 A -- over the course of time?

3 Q In terms of system-wide trends.

4 A In general, to do a fairly quick capsule  
5 summary, what the chart shows if you look at the  
6 column that says "Total Music Base," which is the  
7 fifth column from the right, is the use of music in  
8 the Public Radio system has generally declined from 70  
9 percent in the Spring of 1987 to approximately 65  
10 percent in the Spring of 1996.

11 At the same time, in the column right next  
12 to it, to its right, the news and information program,  
13 the use of news and information programs, throughout  
14 the Public Radio system has increased from  
15 approximately 22 percent of a programs's schedule to  
16 29 percent.

17 Q And if you were to examine the first six  
18 column entries, which -- let me ask you a preliminary  
19 question. Is it your understanding that the column  
20 denominated "Total Music Base" reflects the sum of the  
21 percentages in the six columns preceding it, to its  
22 left?

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1           A       Yes. Yes, it does.

2           Q       And examining those six columns, have you  
3 observed any trends over time?

4           A       Well, some modest trends, yes. The use of  
5 classical music has slightly declined. The use of  
6 jazz music has slightly declined as well as folk,  
7 which is a small percentage but has slightly declined.

8                   World music for 1987 shows a slight  
9 increase. And pop music has pretty much been  
10 relatively constant with eclectic music, as I referred  
11 to earlier, having declined.

12          Q       How would we go about determining the  
13 combination of programming which is format-wise one or  
14 the other of news and information or classical music?  
15 Would that entail totaling up Columns 1 and 7?

16          A       I'm sorry. I lost your question.

17          Q       How would one go about determining the  
18 total percentage of Public Radio programming, which  
19 consists of one of either of two formats: classical  
20 music or news and information?

21          A       Right. It would be one, Column 1, and/or  
22 7. They would represent 1 being classical music,

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1 Column 7 talking about news and information.

2 Q Well, can you tell us a little bit about  
3 how the chart at Page 7 was prepared?

4 A Yes. We do with support from the  
5 Corporation for Public Broadcasting an annual carriage  
6 survey. This has been done -- well, I certainly know  
7 it's been done 1986. I don't know how much prior to  
8 that it was done.

9 Basically this entails us communicating to  
10 each of the stations in the Public Radio system, not  
11 just the NPR members, and getting each of the stations  
12 to fill out a 24-hour, 7-day-a-week program grid,  
13 which identifies each of the programs that they  
14 broadcast during each hour, half-hour of the day.

15 Then that information is retrieved and  
16 basically tabulated by us as part of the carriage  
17 report. This information is extremely important to  
18 the Public Radio system because subsequently it is  
19 distributed by us to the Radio Research Consortium, to  
20 other analytic enterprises that provide information  
21 back to the system.

22 So it's the first cog in a significant

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1 wheel of information.

2 Q If you would turn to Tab 17 of the  
3 collection of Public Broadcasting exhibits? Can you  
4 identity the documents there contained and their  
5 relationship to the chart on Page 7?

6 A Yeah. These are summary documents that  
7 provide by format. And these are done on an  
8 annualized basis, produced by NPR and CPB. Summary  
9 documents for providing information on the amount of  
10 classical jazz or format programming that goes on in  
11 the Public Radio system.

12 Q How reliable do you consider the  
13 information depicted in Chart 7 gathered by the  
14 process you described?

15 A I think it's very reliable because it is  
16 in the mutual best interests of the stations and NPR  
17 that the information be accurate. And it is checked  
18 and double checked.

19 Q At Page 9 of your testimony, sir, in the  
20 first full paragraph, you indicate, "Notably, while  
21 news and information programming accounts for just  
22 under 30 percent of Public Radio's broadcasting hours,

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1 it commands about 50 percent of actual listener  
2 hours."

3 Do you see that?

4 A Uh-huh.

5 Q How do those data relate to your previous  
6 testimony offered to the Panel today about the trends  
7 and tendencies as you see them in terms of program mix  
8 over time in Public Radio?

9 A Well, news and information is the core  
10 competency of National Public Radio. It's what we do  
11 --

12 MR. KLEINBERG: I'm sorry? You dropped  
13 your voice.

14 THE WITNESS: I'm sorry. News and  
15 information is the core competency of National Public  
16 Radio. It is what we do well. It is what -- the  
17 stations have an immense amount of faith and trust in  
18 our judgment and our expertise. It is what the  
19 audience seems to not only like but be keenly  
20 interested in.

21 The trend these past five years has been  
22 towards more news and information programming. And I

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1 would venture to guess that you'll see even a more  
2 significant trend over the next five years in that  
3 respect.

4 BY MR. RICH:

5 Q Turning to your testimony at Pages 11 and  
6 12, with respect to programming expenditures, what has  
7 been the trend, again system-wide, in Public Radio,  
8 not limited to NPR over the past five years?

9 A System-wide it's been relatively flat. As  
10 I said here, it's increased by only 6 percent, from  
11 152 million to approximately 162 million, during that  
12 span in time.

13 Q And if you would turn to PB Exhibit 6,  
14 please? There are set forth there certain unadjusted  
15 programming and production expenditures figures. Do  
16 you see those?

17 A Yes, I do.

18 Q I don't know if you were in the room  
19 yesterday I think when Judge Griffith asked the  
20 question about the down slope in the 1996 entry for  
21 radio of \$161.8 million. Can you explain what  
22 apparently accounts for that?

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1           A       I will try. And yes, I was here to see  
2       Judge Griffith's response to that. The dip between  
3       1995 and 1996, I think there is a -- this isn't an  
4       accurate reflection of more appropriately more  
5       constancy perhaps. It is my understanding that these  
6       numbers reflect between those two years the FASB  
7       changes in reporting requirements.

8                       The expenses for programming -- stations  
9       when reporting the expenses to the Corporation for  
10      Public Broadcasting backed out in kind services  
11      relating to program expenditures, which in Public  
12      Radio are a fairly significant number.

13                      I don't know what the adjusted numbers  
14      ultimately look like, but I think the unadjusted  
15      numbers between 1995 and 1996 don't necessarily give  
16      you the most accurate portrayal.

17           Q       Who, to your knowledge, performed the  
18      adjustments on which public broadcasters rely in this  
19      proceeding? Your understanding as to who performed  
20      these adjustments?

21           A       When these numbers were developed? I  
22      believe the Corporation for Public Broadcasting.

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1 Q I'm not being clear with my question. For  
2 purposes of taking these unadjusted numbers and  
3 presenting them in this proceeding on an adjusted  
4 basis, you didn't perform that, I take it?

5 A That is correct. I didn't.

6 Q Do you know who did?

7 A I believe Mr. Jaffe did.

8 Q And so he would be the expert on how one  
9 gets from the numbers presented in PB 6 to the numbers  
10 reflected in your written testimony?

11 A Correct, correct.

12 Q And you rely on those adjusted numbers and  
13 on his work in that regard?

14 A Yes, absolutely.

15 Q Now, focusing on NPR itself, as opposed to  
16 system-wide, what has happened to NPR's own  
17 programming expenditures over the past five-year  
18 period? That's again reference to your testimony at  
19 Pages 11 and 12.

20 A Yes. NPR's program expenditures for news  
21 and information have grown. We've invested a great  
22 deal of time and effort to expanding our new service.

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1 And let me allude, if I may, to a few of the things we  
2 have done.

3 We have expanded All Things Considered  
4 from an hour and a half show to a two-hour program now  
5 beginning at 4:00 p.m. on the East Coast. We took  
6 Morning Edition and moved it to 6:00 a.m. We  
7 established 24-hour newscasts. We invested in Talk of  
8 the Nation, a daily two-hour news talk show.

9 So we made some significant expenditures  
10 in news and information at the same time that the  
11 monies that we have spent in cultural programming have  
12 stayed materially the same or shown a slight  
13 reduction.

14 Q And I would ask you to turn to PB Exhibit  
15 19, please. And with reference to your testimony in  
16 that exhibit, can you tell me the source of the  
17 information relating to NPR's program expenditures?

18 A On Page 3 of the -- this is an audited  
19 statement produced by Deloitte and Touche, our  
20 auditor, and --

21 Q And the numbers derived from these  
22 documents?

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1           A       The numbers derived -- yeah, yes. Where  
2 do they come from? They come from our annual program  
3 expenditures.

4           MR. RICH: I have no further questions.

5           CHAIRPERSON GRIFFITH: All right.

6           JUDGE GULIN: A couple of questions. I  
7 guess your conclusions that the existing music license  
8 rate should not be increased are based upon the fact  
9 that music use has been flat or declining and that  
10 programming expenditures have been essentially flat.  
11 Is that correct?

12          THE WITNESS: Yes.

13          JUDGE GULIN: Do you know what the rates  
14 are now that are paid?

15          THE WITNESS: Yes, I do.

16          JUDGE GULIN: And it's what? Is it 3.775  
17 million per year by CPB? Does that sound right?

18          THE WITNESS: I know the total over the  
19 past five years, which I could divide by five if that  
20 would help, but that is approximately, right.

21          JUDGE GULIN: And that's paid. So NPR  
22 doesn't pay anything, but, actually, CPB pays the

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1 fees?

2 THE WITNESS: Well, it's a little bit more  
3 convoluted than that, but --

4 JUDGE GULIN: Okay. That's what I was  
5 going to ask you about. Tell me about it.

6 THE WITNESS: Okay. It is my  
7 understanding that the monies that are allocated --  
8 first of all, CPB is mandated by Congress for the  
9 expense on music royalties.

10 The monies, I believe -- that a certain  
11 percentage of what they are granted by Congress is to  
12 go towards the payment off the top to music royalties.

13 My understanding is that the payment the  
14 -- that money is put into an escrow account, which is  
15 controlled jointly by the Public Broadcasting Service  
16 and NPR. And the monies flow out of that escrow  
17 account to the music royalty societies.

18 JUDGE GULIN: Do you know what part of  
19 those funds are allocated for NPR?

20 THE WITNESS: I do not.

21 JUDGE GULIN: Is there such an allocation?  
22 Are you aware that there is such an allocation?

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1 THE WITNESS: I am not aware that there is  
2 such an allocation.

3 JUDGE GULIN: Thank you.

4 CHAIRPERSON GRIFFITH: All right. Mr.  
5 Schaeffer?

6 CROSS-EXAMINATION

7 BY MR. SCHAEFFER:

8 Q Let me just preliminary before I get at  
9 some of it, are you aware of any limit that Congress  
10 has put on the payment overall of music royalties'  
11 performing rights organizations; that is that is there  
12 anything that says that the Public Broadcasting  
13 stations themselves don't have to pay or need not pay?

14 A I'm not aware of that.

15 Q You had mentioned FASB, F-A-S-B. What is  
16 that?

17 A Financial Accounting Standards Board.

18 Q Now, you have said that there was a change  
19 in 1995 or '96. I wasn't quite clear. What was that  
20 change that you were referring to?

21 A It's actually a very complicated change  
22 for the nonprofit industry. It reflects --

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1 Q Well, tell me what --

2 A Well, I'll give you my layman's  
3 interpretation --

4 Q Yes because it's new to me.

5 A That reflects in the way monies are  
6 reported according to Generally Accepted Accounting  
7 Principles. One example I can give you is that on the  
8 revenue side, monies that are donated by a foundation  
9 spread over a period of time -- let's say the Ford  
10 Foundation gives NPR a five-year grant.

11 Q Right.

12 A Those monies, rather than being spread as  
13 they are spent over those five years, are all  
14 reflected in the first year when they are received.

15 Q I see. And that's a difference as from  
16 what it was formally?

17 A That is correct.

18 Q So that would equally be true of a  
19 not-for-profit, such as the Public Broadcasting  
20 Service. Isn't that true?

21 A In terms of them being affected --

22 Q Yes.

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1 A -- by FASB regulations? Yes, that's true.

2 Q All of it? So that it would mean that the  
3 1996 financial reports of PBS, NPR, the Corporation  
4 for Public Broadcasting would also have to reflect  
5 this accounting change, namely there might be for the  
6 first time a bunching up in the previous years when  
7 the payments were received, as opposed to the  
8 amortized income over a period of time. Is that  
9 correct?

10 A Well, I cannot speak for the other  
11 organizations.

12 Q But that's --

13 A But I'm saying that the FASB change did  
14 affect accounting practices.

15 Q So that in reading the financial statement  
16 that Mr. Rich alluded in the 1995-1996 statement in  
17 Exhibit 4 and in the financial reports of the  
18 respective public broadcasters, we have to consider  
19 these FASB changes in order to apply apples to apples,  
20 as opposed to apples and oranges. Would that be your  
21 businessman's opinion?

22 A Yes.

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1 Q Thank you.

2 MR. SCHAEFFER: Now let me ask you another  
3 question before we get to -- I mean, obviously it's  
4 not within his province.

5 BY MR. SCHAEFFER:

6 Q Do you have an idea of how many  
7 approximately broadcasting hours over Public Radio  
8 there are in, say, 1997 or 1996?

9 A Not off the top of my head.

10 Q Whatever that amount of broadcasting hours  
11 by public stations -- and let's confine ourselves to  
12 the public stations, the public radio stations,  
13 represented by NPR in this proceeding. Okay?

14 A Uh-huh.

15 Q If you'd fix that in our -- what  
16 proportion of those broadcasting hours carry  
17 NPR-produced or distributed programs?

18 A Approximately 25 percent of the broadcast  
19 hours.

20 Q So it's far less than the majority?

21 A Certainly.

22 Q And the other 75 percent -- and I'm not

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1 holding you to a specific percent because I know it  
2 would be very difficult. But based on your expertise,  
3 what proportion would be other vendors or would be  
4 locally produced programs or the like?

5 A I think approximately just over 50 percent  
6 would be locally produced program. And the rest would  
7 be representative of NPR, PRI, or other national  
8 distributors.

9 Q Now, in a number of -- I'll withdraw that.  
10 In answering a number of Mr. Rich's  
11 questions, you used the word "We" provide this kind of  
12 diverse programming and you refer to certain  
13 individual programs. Were you referring in those  
14 cases to those programs which were produced by NPR or  
15 all of the Public Radio stations?

16 A I was not in my references referring just  
17 to NPR programming.

18 Q Well, for example, when you said "We do  
19 Jazz Profiles, and we do All Things Considered," in  
20 those cases you were referring to NPR, were you not?

21 A Yes, I was.

22 Q So that sometimes in your testimony

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1 before, when you used the word "we," you were  
2 referring to yourself as representative of all the  
3 stations, the entire Public Radio industry, and in  
4 some cases you were referring to NPR; right?

5 A Perhaps, yes.

6 Q All right. I'm going to show you --

7 MR. SCHAEFFER: Would you put before the  
8 witness ASCAP Exhibit 302? It's already in evidence.  
9 It's called "Future How." You already have a copy of  
10 it. Just to make everybody's life easier, we  
11 reproduced it. I'm sure everybody does.

12 We may do it in rebuttal anyway. We may  
13 do it in rebuttal anyway. Oh, okay. Let me do this.  
14 Remind me because I'm getting all of this advice.

15 BY MR. SCHAEFFER:

16 Q Would you turn to Page 6 of the document?  
17 It's been previously established and I'm sure you'll  
18 confirm this is nothing more than the Corporation for  
19 Public Broadcasting 1996 annual report. Have you read  
20 it before or seen it?

21 A No, I have not read it, nor have I seen  
22 it, actually.

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1 Q All right. I'm going to ask you whether  
2 in your opinion the following statements are accurate  
3 in the report based upon your current -- you have been  
4 now how many years in the Public Broadcasting  
5 industry?

6 A Three years.

7 Q Incidentally, when you came to Public  
8 Broadcasting, did that in any way signal a change in  
9 the way NPR was going to be administered in the  
10 future? Were you part of the policy change when you  
11 came on board?

12 A I would be giving myself far more credit  
13 than I deserve.

14 Q Well, maybe so. And I'm sure you deserve  
15 a great deal of credit because you have a very  
16 difficult job and NPR is a very, very fine service and  
17 Public Broadcasting is an excellent industry.

18 But was it your understanding that you  
19 were brought on board to make some changes in the way  
20 the business was run?

21 A I was brought on board by Delano Lewis,  
22 who is the CEO of NPR, to try to operate the company

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1 more efficiently and better than it had before.

2 Q Was there an understanding that -- by the  
3 way, who did you replace?

4 A There was no Chief Operating Officer  
5 previously.

6 Q So it's a new position?

7 A It was sort of a combination of a few  
8 positions.

9 Q And was the understanding when you came on  
10 board that NPR would be a little more businesslike  
11 than it had been before?

12 A That was I think one of the many  
13 understandings that I had. We were going to change a  
14 little bit of the nature of how we operated.

15 Q Tell us about what those changes were  
16 going to be. And don't spare yourself because I think  
17 everybody in this room, including the PROs, have  
18 nothing but admiration for NPR, PBS, no matter what it  
19 sounded like in this forum and publicly. There's so  
20 much admiration that we think you can easily pay the  
21 prices we're asking.

22 A Then your admiration is definitely

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1 misplaced.

2 (Laughter.)

3 THE WITNESS: The NPR -- and I will use a  
4 few sort of misplaced metaphors here. NPR nearly went  
5 bankrupt in 1983 because it was terribly mismanaged.  
6 Even though it has visionary leadership, it wasn't  
7 very good at managing the shop.

8 In 1983 new leadership came in with a  
9 mandate of getting the house in order. And by getting  
10 the house in order, NPR became an extremely efficient  
11 operation that, frankly, operated much like a  
12 government agency.

13 The metaphor I use is that NPR was a ship  
14 full of a variety of holes that the new leadership was  
15 told to patch, fill, lay out, and anchor and make sure  
16 that you created a stable environment for Public  
17 Radio, which indeed they very effectively did for  
18 approximately ten years. What they did not do was to  
19 ever pick up the anchor and chart, move a little bit  
20 forward.

21 So to a large extent, NPR was functioning  
22 like a government agency, very happy with what it was

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1 doing. And it needed to look at new technologies,  
2 look at other things that it might be doing as service  
3 to the American public in charting its new direction.

4 And that's really what Del Lewis as the  
5 new CEO was charged with doing.

6 BY MR. SCHAEFFER:

7 Q And you, too, I take it when you came on  
8 as COO?

9 A I was brought in by Mr. Lewis.

10 Q By the way, just if you know, in, say,  
11 1983, what proportion, if you know or have an  
12 understanding, of Public Broadcasting hours were NPR  
13 productions or distributions?

14 A I do not know.

15 Q Do you know if it changed downward or  
16 upward since that time?

17 A That would be very hard for me to  
18 speculate on.

19 Q Well, let's go to when for the first time  
20 could you give us your understanding of what the  
21 relative proportions are?

22 A Really, the last ten-year period.

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1 Q Ten years ago, what was the proportion?

2 A The proportion -- NPR's programming has  
3 always increased significantly. Let's see. When  
4 Morning Edition was added, which was 1983 -- it was  
5 the year it almost went bankrupt. So at that point in  
6 time, there was a major distinction in the amount of  
7 programming provided by NPR.

8 Since that point in time, it's been  
9 relatively constant with the addition of other  
10 programs that -- such as Car Talk, which have made a  
11 significant dent and the add-on of significant weekend  
12 news magazines: Weekend Edition Saturday, Weekend  
13 Edition Sunday. So it is slightly increased, but --

14 Q So it is pretty well level at 25 percent,  
15 would you say?

16 A I think it's relatively accurate.

17 Q And just so again because I'm a little --  
18 Car Talk is produced by NPR or acquired?

19 A It's acquired and distributed by NPR.

20 Q And the stations pay for Car Talk?

21 A Certainly.

22 Q Who do they pay?

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1 A NPR.

2 Q Now, are there other stations like Prairie  
3 Home Companion which are produced by other providers  
4 of programming?

5 A Shows like Prairie Home Companion?

6 Q Yes.

7 A Yes.

8 Q And Prairie Home Companion is PRI, you  
9 say?

10 A Distributed by Public Radio International.

11 Q Who pays? PRI gets paid separately by the  
12 stations for that service or that program?

13 A That is correct.

14 Q And I assume there are a whole bunch of  
15 providers out there to the stations like PRI -- a  
16 "whole bunch." There is more than one provider to the  
17 stations other than PRI and NPR?

18 A Yes. NPR and PRI are the two largest  
19 national distributors. Stations can distribute their  
20 own produced programs. Independent producers can  
21 distribute programs as well.

22 Q And just so I get the picture before we go

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1 into what I'm going to ask you in a minute, I know  
2 that from my own learning, there are very music  
3 services and there are jazz services that sometimes  
4 you hear on radio, classical music, popular music.

5 Are in any of those cases those also  
6 producers outside of NPR or PRI who then sell those  
7 services as sort of a package to the stations?

8 MR. RICH: Object to the form.

9 CHAIRPERSON GRIFFITH: I didn't hear what  
10 the objection was.

11 MR. RICH: That there was a factual  
12 predicate. He said, "I know there are."

13 MR. SCHAEFFER: Oh, I'll --

14 MR. RICH: There's no foundation to --

15 BY MR. SCHAEFFER:

16 Q Isn't it a fact that there are a number of  
17 producers who sell packages of music to Public Radio  
18 stations for broadcasting by them?

19 A You used the term "a number." I'm not  
20 aware of a number of producers. I think there are a  
21 limited few. And I think the majority of what is  
22 distributed to Public Radio stations are programs, not

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1 services.

2 Q Well, isn't there sort of something called  
3 Beethoven?

4 A Uh-huh.

5 Q What is that?

6 A It's called a Beethoven -- what is it  
7 called? That is a service -- I believe that is a  
8 service provided by a commercial station out of  
9 Chicago. It is primarily an overnight service that  
10 Public Radio stations can purchase if they so choose.

11 Q And it has a different sort of a number of  
12 musical pieces that then are rebroadcast? How does  
13 that work?

14 A I believe it's a stream of classical  
15 programming that is developed by that service.

16 Q Is there also something like that for some  
17 jazz music?

18 A I truly don't know. I know there are two  
19 stations that are known for their jazz music. And I  
20 don't know if they're providing the streams that they  
21 have developed to the system.

22 Q Did you ever hear of Classical 24th?

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1 A Oh, yes.

2 Q Is that another one of these kinds of  
3 services?

4 A That comes out of Minnesota Public Radio.

5 Q I see. All right. Well, let's move on to  
6 what I was going to ask you before. Would you look at  
7 page -- I think we were looking at Page 6. And this  
8 is from the CPB. And I would solicit your views as to  
9 whether or not you agree based on your experience in  
10 the last three years. This was written in 1996 or at  
11 least for the report in '96, must have been '97.

12 "Over the next five years, Public Radio  
13 must strengthen its audience service and be more  
14 accountable to its listeners. Audience service needs  
15 to improve because Public Radio's community financial  
16 support must increase faster over the next few years  
17 than it has over the past five years.

18 "Today Public Radio consists of several  
19 hundred local licensees that provide quality  
20 programming and services to 92 percent of the U.S.  
21 population. Its weekly audience is growing, 35  
22 percent since 1990, and now includes 19 million

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1 listeners. System financial growth over the past 5  
2 years has been driven by listener support, up more  
3 than 40 percent, and by underwriting, up by more than  
4 two-thirds."

5 Would you agree with that?

6 A Would I agree with what?

7 Q With what CPB is there stating in its  
8 annual report of 1996. Does that sound right to you?

9 A I would agree with the following. The  
10 public -- because I have a sense of where this came  
11 from having been involved with the future fund. The  
12 Public Radio system has been challenged by the federal  
13 government to create ancillary streams of support  
14 based upon the likely possibility that federal funding  
15 will diminish or disappear over the course of a number  
16 of years.

17 So yes, I would agree that it is in the  
18 interest of Public Radio stations everywhere to  
19 strengthen their listener base, to increase listener,  
20 and to increase listener-sensitive income.

21 Q And, as far as you know, are the numbers  
22 that CPB here reports accurate? Do you have any

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1 reason to dispute them, namely 90 percent, 92 percent  
2 of the population is served, that the audience is  
3 growing, 35 percent since 1990, et cetera?

4 A I actually think that we're serving more  
5 than 92 percent, but I don't have any way of  
6 validating the 35 percent growth.

7 Q You had made reference and this page also  
8 refers to something called the radio future fund. And  
9 I'll leave it to the -- well, let me know if you agree  
10 with this, "The radio future fund identifies and  
11 supports initiatives to increase Public Radio's  
12 listener and corporate support by about 60 to 100  
13 million dollars annually within three years. It  
14 encourages stations, producers, and related  
15 organizations to increase productivity, operate more  
16 efficiently through cooperative efforts, resulting in  
17 significant annual savings, and to strengthen audience  
18 services through programming."

19 In your understanding of how radio future  
20 fund works, is that a fair description?

21 A It's a fair -- the numbers that were used  
22 -- in fact, I objected to the numbers used because I

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1 thought that CPB was establishing numbers that were  
2 outside the realm of reality to radio.

3 The concept of the future fund is to  
4 stimulate stations to do a better job, which is in a  
5 whole range of areas from their fund-raising  
6 capability to plan giving to major gift solicitation  
7 to efficiency in operation and to better format  
8 focusing in their programming.

9 Q Well, in fact, though, is it not true that  
10 NPR received in 1996 a sum in a project aiming to  
11 boost system-wide underwriting income by coordinating  
12 multi-market underwriting sales and adding value to  
13 underwriting?

14 A That's absolutely true.

15 Q By the way, I know I'm jumping around.  
16 And forgive me for that.

17 With respect to the PRI feeds -- well,  
18 let's ask about NPR first. When NPR charges its  
19 members for programs, what's the basis for the charge?  
20 Do they charge per capita? Do they charge by market  
21 share? Do they charge by revenue? How do they  
22 charge? How does NPR charge?

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1           A       I'll be happy to answer that.

2           Q       Sure.

3           A       And if you'll bear with me, I need to  
4       throw a little bit of history in here that might help.

5                   NPR for a number of years charged its  
6       member stations on what it cost NPR to operate.  
7       Basically it was: Well, last year we spent \$15  
8       million. This year we want to spend \$16 million.  
9       And, from what I have been told, annual membership  
10      meetings were quite a sight to behold because it  
11      became an annual negotiation between what NPR thought  
12      it should charge and what the stations felt that they  
13      could pay.

14                  A number of years ago, -- and I believe it  
15      was just over five years ago -- a new model was  
16      established for a number of reasons. The model was to  
17      base what NPR charged on total station revenue.

18                  Total station revenue represents what a  
19      station generates annually in three areas: nonfederal  
20      financial support; community service grant from CPB;  
21      and what is called the NPPAG grant, which stands for  
22      National Program and Program Acquisition Grants.

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1                   So when you combine those numbers,  
2                   nonfederal financial support, the CSG, and the NPPAG  
3                   monies, that became your total station revenue. And  
4                   NPR charges stations a percentage of that total  
5                   station revenue on an annualized basis.

6                   Now, this was done for a number of  
7                   reasons: one, to buy peace in the system because it  
8                   was established under what we call a five-year  
9                   lock-down, where the percentage would stay the same  
10                  over five years.

11                  But, more than that, it was to establish  
12                  a fair basis for purchase. And it is not necessarily  
13                  the system we want to stick with all the time, and  
14                  I'll get back to that soon.

15                  But, just so you get a sense of what we  
16                  charge, we charge 11 and a half percent of total  
17                  station revenue for news and talk programming. We  
18                  charge 2.1 percent for cultural programming. And the  
19                  only way we are able to charge 2.1 percent for  
20                  cultural programming is because we include Car Talk in  
21                  that package for cultural programming.

22                  Car Talk in itself represents

1 approximately 70 percent of that charge, that 2.1  
2 percent. So if you take Car Talk out, our real charge  
3 for cultural programming is approximately .6 of one  
4 percent.

5 It is our intention, even though this  
6 method of charging will continue for at least another  
7 year or two, to eventually shift more to a listener  
8 hour basis, which will really relate to the value of  
9 our programming, rather than what the program enables  
10 you to generate in terms of funding, which is the  
11 basis it's used now.

12 Q Have you done any calculation of what the  
13 -- have you figured out the cost of providing music to  
14 those stations for which you were getting this fee?  
15 In other words, in setting the fee for what you've  
16 described as cultural programs, -- and you've very,  
17 very eloquently indicated that Car Talk is a part of  
18 the package -- have you expensed out what it costs  
19 your production to sell that music for that price or  
20 haven't you done it?

21 A Well, there are two different -- what it  
22 costs for us to produce the show we know very well.

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1 The cost of --

2 Q What about the cost of using the music?  
3 Had you factored that in?

4 A Cost of using the music.

5 Q You pay license fees, don't you? I guess  
6 you don't. Have you figured out the cost of what CPB  
7 pays in license fees in realizing your return for this  
8 fee?

9 A We don't do it that way.

10 Q I see.

11 A There is no way we could charge a fee for  
12 what it costs for us to produce cultural programming  
13 -- okay? -- because the stations, quite frankly, would  
14 not pay for it.

15 Q Well, but even if you were doing that  
16 calculation or when you're thinking out what the price  
17 is of the fee, you don't consider at all a cost of  
18 what would be paid to the performing rights  
19 organizations, do you?

20 A Well, I think, as Mr. Downey said earlier,  
21 the cost of the fee paid to the performing rights  
22 organizations comes out if the money is given from

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1 Congress to the Corporation for Public Broadcasting at  
2 present.

3 And that comes off the top, which means  
4 the CSG monies and the NPPAG monies, which the  
5 stations received from the Corporation for Public  
6 Broadcasting, would otherwise be increased had that  
7 amount not come off the top.

8 There is an indirect relationship in what  
9 they can pay us.

10 Q Have you -- and maybe you haven't. Have  
11 you bothered to figure out whether there would have to  
12 be an increase other than de minimis in the charges  
13 you would be making to the member stations if the  
14 proposals of ASCAP were accepted by this Panel?

15 A I have looked very briefly at the impact  
16 on the Public Radio system were a 300 to 400 percent  
17 increase be established for Public Broadcasting and  
18 the impact on Public Radio. I think the impact would  
19 be substantial on Public Radio.

20 Q How much would it be per station?

21 A See, that's a very hard way to look at it  
22 because it's very different. The size of our stations

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1 varies from market to market. The level of  
2 sophistication varies from market to market.

3 A \$1,000 increase or a fee charged to a  
4 station in New York is unbelievably different than a  
5 \$1,000 fee established or charged to a station in  
6 rural Alaska.

7 I will tell you in my opinion that if  
8 hundreds of dollars or thousands of dollars were  
9 attached to the fees that small rural stations would  
10 have to pay, they could not afford to pay it. It  
11 would change substantially the nature of the Public  
12 Radio system. And, in fact, it would change  
13 substantially the universality of service as it exists  
14 now.

15 Q Have you calculated what the impact of the  
16 fee would be if it was made proportional to the gross  
17 revenue of each of the stations?

18 A I have not specifically done that, no.

19 Q And that might make a difference, wouldn't  
20 it? In other words, the larger revenue-producing  
21 station would pay the lion's share of the fee  
22 increase; whereas, the stations that have de minimis

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1 revenue would presumably pay a proportionally de  
2 minimis amount of their income.

3 A I wish I could respond favorably to that,  
4 Mr. Schaeffer, but it is a small station. And we have  
5 well over 100 -- the size of our station -- our member  
6 station budgets is very different from the Public  
7 Broadcasting Service. We have over 100 stations with  
8 very small, extremely small budgets.

9 They get all of our programming just for  
10 paying the annual membership fee of approximately  
11 \$7,000. With that fee raised to \$7,500 or \$8,000, it  
12 would have a severe impact on them.

13 Q Have you done --

14 A You can't discount. We know from our  
15 member stations that any additional fees, especially  
16 at the lower levels, will severely impact them and  
17 injure them.

18 Q These stations that couldn't afford the  
19 additional four or five hundred dollars, they're  
20 getting programs from other producers as well, aren't  
21 they?

22 A Not necessarily. I mean, it depends on

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1 the station and in the market.

2 Q Okay. Well, let me ask you: Do you have  
3 an understanding how your competitor, PRI, charges?

4 A Yes, I do.

5 Q How do they charge?

6 A Well, they're not a membership  
7 organization. So they charge a fee for programming or  
8 a fee for service. It's a whole -- it's a different  
9 structure than we do.

10 They also do things in the marketplace  
11 that we don't do. As an example, they have  
12 exclusivity, where if you are broadcasting, if you're  
13 -- one station chooses buy A Prairie Home Companion in  
14 a particular market, then another Public Radio station  
15 cannot access that show.

16 Q Well, is it a fact that their fees are  
17 based on station revenues?

18 A I believe at present, they are, yes.

19 Q Are there any other producers that you're  
20 aware of that are competitors with NPR that also  
21 charge on the basis of station revenue?

22 A I do not know.

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1 Q For example, you mentioned before  
2 Classical 24. Do you know how they charge?

3 A That's distributed by PRI.

4 Q I see. And what about the Beethoven  
5 whatever it was?

6 A I do not know how they charge. That's  
7 distributed by WFMT.

8 Q Would you agree -- well, let's move on  
9 because that was just argumentative.

10 MR. SCHAEFFER: Would you put before the  
11 witness --

12 JUDGE DREYFUS: While we're at a break,  
13 while we're moving on to something else, a question.  
14 News and talk was 11.5 percent of revenues for  
15 membership fee, and there was another factor of 2.1  
16 percent for cultural. Is that correct? Were there  
17 any other factors besides these two?

18 THE WITNESS: Yeah. On the news/talk side  
19 -- and I did leave this out. On the news/talk side,  
20 what you're paying for for the 11.5 percent is  
21 primarily the seven-day-a-week news magazines and the  
22 newscasts.

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1                   If you choose to pay for a show like Talk  
2 of the Nation, everything else in news/talk is a la  
3 carte on top of that.

4                   JUDGE DREYFUS:     As a percentage of  
5 revenue?

6                   THE WITNESS:   No. As a flat fee for the  
7 program.

8                   JUDGE DREYFUS:   Okay.

9                   THE WITNESS:   On the cultural side, -- and  
10 this is something I forgot to mention -- there is  
11 actually a ceiling as to how much you can pay on an  
12 annualized basis.

13                   If you choose all of our cultural  
14 programs, the maximum you can pay annually is \$23,000;  
15 whereas, stations who buy news/talk and our news/talk  
16 package, especially the larger stations, can pay  
17 anywhere from 600 to 800 thousand dollars per year.

18                   BY MR. SCHAEFFER:

19                   Q     By the way, have you ever done an  
20 analysis, again as a general group, of what it costs  
21 to produce these so-called cultural programs, as  
22 opposed to what it costs to produce these so-called

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1 news programs?

2 A Well, we know in our annual budget what we  
3 budget for news programs. And I think that was within  
4 my testimony.

5 Q Give us an approximation. In 1997, what  
6 did you budget for news programs?

7 A Approximately -- we budgeted about \$24  
8 million for NPR news, and we budgeted about  
9 approximately \$5 million for NPR cultural.

10 Q Thank you.

11 MR. SCHAEFFER: Do we take a break at 3:15  
12 or 3:30? I don't know. I'm not asking about -- I  
13 mean, I don't care. I just didn't know if you wanted  
14 me to go on to the next subject.

15 CHAIRPERSON GRIFFITH: Unless someone  
16 wants to, let's go to the --

17 MR. SCHAEFFER: That's fine. Could you  
18 put in front of the witness Exhibit 521.13? And I  
19 think that will be ASCAP Exhibit 19X.

20 (Whereupon, the aforementioned  
21 document was marked for  
22 identification as ASCAP

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Cross-Examination Exhibit

Number 19X.)

MR. RICH: Pardon me. What's this?

CHAIRPERSON GRIFFITH: 19X.

MR. SCHAEFFER: 19X, Bruce.

BY MR. SCHAEFFER:

Q Would you look at 19X, which I believe is  
an article from the now Current of May 27th, 1996?  
Have you ever seen this article?

A I believe I have, yes.

Q Are you familiar with Current?

A Oh, yes. Yeah.

Q And I assume, like most people in your  
industry, you read it religiously?

A Oh, no, I don't.

Q You read it irreligiously?

A Irreligiously, yes.

Q You do read it from time to time?

A I do read it from time to time.

Q Are you familiar with a reporter named, I  
think it is, Jacqueline Conciatore?

A Conciatore, yeah.

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1 Q And I believe, although I may be  
2 corrected, the J. C. in this article is clearly her,  
3 --

4 A Uh-huh.

5 Q -- Current not having such a big staff?

6 A Yes.

7 Q I assume you know her to be a reasonably  
8 reliable reporter or don't you?

9 A Yes, I think reasonably reliable is fair.

10 Q Okay. There's a gentleman named John  
11 Sutton mentioned in here. Who is he?

12 A John used to be the head of audience  
13 research for NPR.

14 Q Used to be. Is no longer?

15 A He is no longer. He has his own company.

16 Q What does audience research do?

17 A Works with our stations to -- well, it  
18 does a number of things. One is to help stations and  
19 NPR get a better understanding of who our audience is.  
20 It also had within John's purview and perhaps most  
21 importantly the on-air fund-raising partnership  
22 between NPR and the stations, where we work with

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1 stations to help them learn how to fund-raise over  
2 their air.

3 Q Now, Mr. Sutton says, "In the past, we  
4 have been" -- before I get to that just so it will  
5 help me also, in the first paragraph, there's a  
6 reference to PRC. What is PRC?

7 A Public Radio Conference. It's an annual  
8 event that NPR puts on.

9 Q And is that a fund-raising event?

10 A No.

11 Q What kind of event is that?

12 A It's an annual conference for all our  
13 stations.

14 Q I see. Now, Mr. Sutton says, "In the  
15 past, we," and I assume that's NPR, "have been  
16 producer-driven. Now we want to focus on day parts  
17 and what the audience wants from radio."

18 Was that an accurate viewpoint of the NPR  
19 policy-makers in 1996?

20 A What it's referring to I think is a little  
21 bit more complex than the small words quoted in this  
22 article.

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1 Q Why don't you tell us?

2 A For many years the Morning Edition and All  
3 Things Considered were considered to be what in the  
4 Public Radio industry, we refer to as the tent poles.  
5 Drive time in the morning, drive time in the  
6 afternoon, the audience builds. And then between the  
7 tent poles, it declines.

8 The stations had asked us to see if we  
9 could lift up the middle of the day parts with more  
10 news/talk programming that would hopefully keep more  
11 listening for longer periods of time between Morning  
12 Edition and All Things Considered.

13 Q Thank you.

14 Now, what is day-parting as a concept? Is  
15 that a concept known to the radio industry at large or  
16 just Public Broadcasting?

17 A I can't talk for the radio industry at  
18 large, but day parts refer to certain times of the day  
19 and certain listening habits. You know, drive time is  
20 a day part.

21 We were trying to focus on those times  
22 when there seemed to be an interest on more

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1 programming from NPR where we could serve the American  
2 public by providing that programming.

3 Q And in 1997 and 1998, is movement toward  
4 day-parting, which you say was instituted around this  
5 time, continued as part of the Public Radio's  
6 activities?

7 A As par of our analysis, there were two  
8 significant voids in Public Radio programming: the  
9 afternoon day part and the weekend afternoons after  
10 the morning news magazines.

11 Q And just so -- I mean, I have to keep it  
12 in mind. In this sense, NPR is playing two different,  
13 as I take it, more or less discrete roles. Maybe it's  
14 not discrete. One, you're a provider of programming.  
15 And otherwise you're an adviser of the stations.

16 So to the extent that you're not dealing  
17 with NPR programming as such and as an adviser of the  
18 stations, I assume it's up to the station to follow  
19 your suggestions or ideas. Is that correct?

20 MR. RICH: I have a form objection.

21 MR. SCHAEFFER: I don't know what's wrong  
22 with the form, but I'm perfectly willing --

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1 CHAIRPERSON GRIFFITH: You state a number  
2 of assumptions for which a foundation hasn't been  
3 established. Rephrase it without using assumptions.

4 MR. RICH: Assumed roles for NPR, et  
5 cetera.

6 BY MR. SCHAEFFER:

7 Q Insofar as NPR recommends day-parting as  
8 a device for the Public Radio stations, is that in  
9 your capacity as counselor to the stations?

10 A That's not exactly what we do.

11 Q Well, tell me what you do.

12 A NPR as a membership service organization  
13 and as a program producer tries to do what is in the  
14 best interest of its membership and the American  
15 public. If we feel that there is a void in the  
16 programs being provided, either we'll try to produce  
17 such a program or we'll try to acquire it.

18 We cannot mandate nor dictate what a  
19 Public Radio station chooses to carry. That is all  
20 done at the local level. We can advise, encourage,  
21 cajole, but it is all a local decision.

22 And the Public Radio system is by no

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1 stretch of the imagination a network. Stations run  
2 programs when they choose to run the programs.

3 Q I think you've made that clear.

4 Now, I notice in this article, there's a  
5 statement, "At a PRC session on NPR cultural  
6 programming, some managers said they worry NPR is  
7 giving music programming an increasingly shorter  
8 shrift. Nebraska Public Radio's Steve Robinson took  
9 issue with NPR's February offer of a discount on  
10 audience research to help stations evaluate the  
11 probable outcomes of switching to all news formats.  
12 'NPR seems to be encouraging stations to go all news,'  
13 he said.

14 "NPR cultural programming head Sandra  
15 Rattley-Lewis responded that 'NPR concluded  
16 development of the news/talk package before her  
17 department was ready with all of its news service.  
18 The network is devising program streams that will  
19 serve news, music, homogeneous or mixed formats,' she  
20 indicated. 'We have not abandoned our commitment to  
21 cultural programming.' "

22 Is that an accurate position of NPR as of

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1 this time?

2 A Well, you have a number of mixed  
3 representations in there.

4 Q Okay. Why don't you tell me what's right  
5 and what's wrong?

6 A Well, certainly we've never abandoned our  
7 commitment to cultural programming. Nor have we now.  
8 We were only -- based upon information and interest,  
9 we were encouraging -- we were not officially  
10 encouraging stations to abandon one format for  
11 another.

12 But what we were doing was saying this  
13 format seems to work best on your station. Maybe if  
14 you develop it further, you'll do a better job in  
15 serving your audience.

16 There are many examples around this  
17 country of stations that mix formats. And sometimes  
18 when they do, it is at the expense of their audience.

19 Q What's a mixed format?

20 A I can give you -- I mean, there are many  
21 stations that use a number of formats, but the primary  
22 format in the Public Radio system is classical and

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1 news.

2 Q Well, but you just used the word -- and  
3 I'm curious about that. You just said something about  
4 I thought mixed format. And she said, "That will  
5 serve news, music, homogeneous or mixed formats."  
6 That implies that some formats are homogeneous and  
7 some are mixed.

8 Isn't that a fact that there are some  
9 formats that are both music, talk, and news?

10 A Yeah, there are some formats that are  
11 music, talk, and news.

12 Q What would they be called in the system  
13 that NPR and Corporation for Public Broadcasting have  
14 evolved for classifying formats?

15 A They would probably be called in most  
16 cases classical/news.

17 Q They would be called classical/news?

18 A Uh-huh.

19 Q And, just for my own curiosity, in looking  
20 at the -- now, where am I going to find these charts?  
21 I apologize. As usual, I'm unprepared. Well, in the  
22 chart in your testimony -- well, I don't know what it

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1 is.

2 In the format carriage trends on Page 7 of  
3 your direct testimony and in -- there's the program  
4 information. No. I have the wrong one. It's Public  
5 Radio programming Fiscal Year 1987 forward. There is  
6 nothing in here I think about classical/news format.

7 MR. RICH: May we get a clarification of  
8 what Mr. Schaeffer is referring to?

9 MR. SCHAEFFER: Exhibit 17.

10 MR. RICH: Thank you.

11 BY MR. SCHAEFFER:

12 Q Let's look at Exhibit 17 because I may  
13 have -- well, anyway, I'm not going to waste your  
14 time. It's getting late. The document will speak for  
15 itself. Don't answer the question. The document  
16 speaks for itself. So don't.

17 There's reference in this ASCAP Exhibit 19  
18 to something called the station consultation model.  
19 It's on the second page, 14, and the first column. Do  
20 you see that? It says --

21 A No.

22 Q Okay. Let me read it to you. It says,

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1 "All of these moves build on the success" --

2 A Oh, this is the back of what you gave me  
3 previously?

4 Q Yes. I'm sorry. It's the second page.  
5 I don't know what -- I thought it was a separate page.  
6 Forgive me on this. I apologize.

7 A Okay.

8 Q In the first column on the rear, in the  
9 middle of the page, it says, "All of these moves build  
10 on the success of NPR's ATC expansion using the same  
11 station consultation model, NPR execs say."

12 So, for this layman anyway, would you tell  
13 us what the ATC expansion is and what the station  
14 consultation model is?

15 A Yes. Whenever we do or think about doing  
16 a major shift in one of our national -- a change in  
17 one of our national programs, where we have an idea  
18 for a new program or we feel that something is  
19 appropriate for the Public Radio system, we form an  
20 advisory group in consultation with member station  
21 managers.

22 This gives us a much better grass roots

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1 sense of whether what we are thinking in Washington  
2 makes sense for the industry. For a number of years,  
3 the stations wanted us to make All Things Considered,  
4 ATC in this article, into a two-hour show, rather than  
5 a one-and-a-half-hour show, 90-minute show, and to  
6 move it to a 4:00 p.m. start on the East Coast, which  
7 after a long and protracted consultative process, we  
8 did a little over a year ago.

9 Q Okay. Thank you. Now I understand that.

10 And we'll leave this exhibit, but I have  
11 another question. If you look in the second column on  
12 what must be the rear side, 521.14, there's the  
13 statement, "NPR announced that if all the major  
14 broadcast networks agree to give the presidential  
15 candidates free air time, it will air their statements  
16 as well. The messages would come during prime time.  
17 So stations on the East Coast would have to break  
18 format to air them."

19 Am I correct in understanding the Public  
20 Radio in May of 1996 took the position that it would  
21 only give presidential candidates free air time if the  
22 commercial stations did so as well?

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1           A       I think what we've done, what we did at  
2       this time, if my recollection is appropriate, we  
3       wanted to make sure that there was consistency with  
4       what NPR provided its constituency.

5                   And if -- in this case, if the other major  
6       -- we consider ourselves a major news organization,  
7       national news organization.

8           Q       And you certainly are.

9           A       And that if the other major international  
10      news organizations were going to be feeding that, we  
11      would feed it as well.

12          Q       But if they wouldn't, you wouldn't?

13          A       We wanted there to be consistency across  
14      the spectrum.

15                   MR. SCHAEFFER: Do we want to take a break  
16      now?

17                   CHAIRPERSON GRIFFITH: I would suggest we  
18      do, Mr. Schaeffer. We can pick up --

19                   MR. SCHAEFFER: We'd better because messy  
20      as I am already, I got even messier. I apologize.

21                   CHAIRPERSON GRIFFITH: We'll give you a  
22      chance to pick up your papers.

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1 (Whereupon, the foregoing matter went off  
2 the record at 3:36 p.m. and went back on  
3 the record at 3:50 p.m.)

4 CHAIRPERSON GRIFFITH: Mr. Schaeffer,  
5 whenever you're ready, sir.

6 MR. SCHAEFFER: I'm ready, Your Honor.

7 BY MR. SCHAEFFER:

8 Q I take it underwriting is payment by third  
9 parties in connection with the production or  
10 broadcasting of public radio programs? Is that a fair  
11 definition?

12 A Underwriting is payment by third party for  
13 an underwriting credit on a public broadcast show or  
14 public radio show.

15 Q And at the present time in the public  
16 radio system, is there both local and national  
17 underwriting?

18 A Yes.

19 Q Would you explain to the Panel what the  
20 difference is?

21 A National underwriting is a type of  
22 underwriting that a national program, producer or

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1 distributor would append to a program at either the  
2 top or bottom of the hour. Local programming is that  
3 type of underwriting that is sold by the local  
4 distributing body, normally the local public radio  
5 station.

6 Q So for example, you've testified that  
7 approximately 25 percent of the broadcast hours on  
8 public radio are attributable to NPR and NPR, I  
9 assume, gets national underwriters and gives those  
10 credits at the top and the bottom of the NPR program  
11 or some segments of the program, is that right?

12 A We try to sell national underwriting where  
13 we can for our national programs, yes.

14 Q And how do you sell that?

15 A We have a development department and the  
16 development department works with corporations or in  
17 some cases their advertising agency to see if they  
18 will purchase some underwriting on our air.

19 Q And I take just as a question of  
20 curiosity, do the people who sell the -- sell the time  
21 to the underwriters, so to speak, or solicit the  
22 underwriters, do they get paid on a commission basis?

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1 A No, they do not.

2 Q And how -- but I assume the advertising  
3 agencies work in their usual fashion, that is, they  
4 get compensated based upon the placement or don't  
5 they?

6 A I don't know.

7 Q You don't know. Now with respect to --  
8 are there certain rates that NPR charges, for example?

9 A We do not have a rate card, if that's what  
10 you're asking.

11 Q Yes, how does one find out what one would  
12 have to pay in order to be an underwriter on an NPR  
13 program?

14 A Normally, our development staff works with  
15 the corporation or the representative body for the  
16 corporation to design a package that would serve the  
17 corporation's needs and our interest as well.

18 Q And so are you saying in each instance the  
19 underwriting price is negotiated with the individual  
20 business underwriter? I'm talking about national, now.

21 A I would say the package is negotiated.

22 Q What do you mean by the package?

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1           A       Well, for instance, a corporate  
2 underwriter might just want to purchase an  
3 underwriting spot in Morning Edition or All Things  
4 Considered. We would encourage them to do more than  
5 that. That might include the contribution to NPR or  
6 it might include working with us to support one of our  
7 cultural programs. It might include a variety of  
8 sponsorship opportunities including the Public Radio  
9 Conference.

10           Q       In connection with the solicitation of  
11 underwriters is there, are there any market studies or  
12 literature given to the underwriters explaining the  
13 impact of what the announcement may or may not have  
14 for the prospective underwriter?

15           A       Yes. The underwriter is normally by our  
16 development office given a package of materials that  
17 describes NPR and also describes our stations and also  
18 describes the public radio audience.

19           Q       Well, we don't have it here, but when you  
20 say there's description of the audience, what kind of  
21 description? There are references to Arbitron or  
22 local markets, big markets? Is there anything like

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1 that discussed in the marketplace?

2 A It will also talk about the nature of our  
3 audience and might, in some cases, refer to the  
4 demographics of the audience.

5 Q And by demographics, I assume you would  
6 mean income, age, things of that sort?

7 A Also avocation. It primarily deals with  
8 the educational level and the avocations of our  
9 audience.

10 Q What do you mean by demographics?

11 A Age, income, education level.

12 Q And is there any reference to things like  
13 Arbitron in any of the literature or don't you know?

14 A I don't know.

15 Q Can you tell us relatively how much money  
16 was achieved by national underwriting, let's say in  
17 1997 by NPR?

18 A By NPR alone, I would venture to guess  
19 somewhere in the neighborhood of \$8 million.

20 Q And with respect to non-NPR producers, do  
21 you know how much was produced?

22 A No.

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1 Q Do you have any understanding as to how  
2 much the local station produced in 1997 in terms of  
3 underwriting, I assume it's much bigger --

4 A I truly don't know what that number is.

5 Q Now in connection with national  
6 underwriting, is there a policy of encouraging common  
7 carriage? You understand what common carriage is,  
8 don't you?

9 MR. RICH: I would like to interpose an  
10 objection first. There was no testimony elicited on  
11 direct about underwriting practices, selling of  
12 underwriting time, common carriage or any of these  
13 areas. I've been patient, seeing how far Mr.  
14 Schaeffer would go, but there isn't a scintilla of  
15 testimony covering this area in this witness's direct  
16 testimony.

17 MR. SCHAEFFER: Part of our argument is  
18 that which walks like a duck, quacks like a duck and  
19 looks like a duck, is a duck. We've been claiming and  
20 I think it's no secret to anybody that the public  
21 broadcasters of television and radio are now in a kind  
22 of commercial entrepreneurial mode which makes it

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1 appropriate for them to pay for our music as any other  
2 business would or at least on the same levels of that  
3 music. And therefore, it seems to me appropriate for  
4 me in cross examining that witness to go into these  
5 issues?

6 CHAIRPERSON GRIFFITH: The objection is  
7 overruled.

8 BY MR. SCHAEFFER:

9 Q Let me go back. Do you have an  
10 understanding, is there such an expression in the  
11 broadcasting industry as common carriage?

12 A I think there is on the television side.  
13 There is not anything that I know of in the radio  
14 side.

15 Q All right, and the radio side is there a  
16 word carriage?

17 A Certainly.

18 Q What does carriage mean on the radio side?

19 A It's when a station carries a program.

20 Q Now with respect to the broadcasting of  
21 nationally underwritten programs are there any efforts  
22 by NPR with respect to its programs to achieve

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1 carriage at more or less the same times among its  
2 various affiliated stations?

3 A I wish it were that easy in public radio.  
4 We broadcast as an example for Morning Edition and All  
5 Things Considered, we would hope the stations would  
6 broadcast them at the appropriate drive time in their  
7 market. Because we broadcast Morning Edition starting  
8 at 5 a.m. on the East Coast, on the West Coast it  
9 starts at 2 a.m.

10 Some stations will carry the programs  
11 rolled over through drive time. Others in the market  
12 may carry it for a certain amount of time and then  
13 another station will pick the program up on a roll  
14 over and carry it for an alternative length of time.  
15 There is no consistency, if that's the best answer to  
16 your question.

17 Q Is there any effort on the part of NPR to  
18 achieve consistency, unsuccessful or successful?

19 A In the best interest of the public radio  
20 system, we would like there to be a little bit more  
21 consistency throughout the programming schedule. But  
22 I don't know of anything that we have done or has been

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1        tried that has succeeded at making them more  
2        consistent.

3            Q        And is it your testimony that there have  
4        been no proposals made by NPR to its affiliated local  
5        stations designed to encourage common carriage, as  
6        I've described it?

7            A        Again, common carriage is not the right  
8        term. We certainly have encouraged our stations that  
9        certain programs carried at a certain time will be  
10       more effective in serving their audience.

11          Q        Have you proposed any financial penalties  
12       or any financial rewards or any concessions or the  
13       contrary in order to achieve that consistency you've  
14       just described?

15          A        We encourage stations to take programs as  
16       fed and when we put together a package, let's say a  
17       news talk package that runs from 10 in the morning on  
18       the East Coast until 4 in the afternoon, we will  
19       discount it if they run it as fed in the a la carte  
20       price.

21          Q        I see, and what is the discount that  
22       you're talking about?

1 A What is the discount?

2 Q How much is the discount?

3 A It might be 10 percent offer, 5 percent  
4 offer. I'm not aware of the specific discount, but  
5 yes, we will try to encourage them to do that but  
6 quite frankly I don't think that has succeeded very  
7 well.

8 Q Well, you tried to financially, by  
9 financial needs is what I'm saying. It may not be  
10 successful, but you try and give them a better price,  
11 is that a fair comment?

12 A It's a fair comment. It's one of them.

13 Q We next put in front of the witness  
14 something that has not been marked before. It's nine  
15 pages. It comes, I believe, from our point of view of  
16 the NPR web site. It would be ASCAP 20 for  
17 identification.

18 (The document referred to was  
19 marked for identification as  
20 ASCAP Exhibit No. 20.)

21 I do intend to offer that in evidence and  
22 I think I would move 19 in evidence.

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1 MR. RICH: No objection to 19.

2 CHAIRPERSON GRIFFITH: To 19.

3 MR. SCHAEFFER: He hasn't seen 20 before,  
4 Your Honor.

5 JUDGE GULIN: 19X is one of these that was  
6 -- it's in evidence now?

7 MR. SCHAEFFER: I believe that's correct.

8 MR. RICH: If so, we would withdraw our  
9 objection.

10 MR. SCHAEFFER: We hope -- we're pretty  
11 close to what we agreed on.

12 JUDGE GULIN: Okay, so the motion to  
13 strike this Exhibit 521 to 13 is withdrawn?

14 (Pause.)

15 MR. RICH: Although partially illegible,  
16 we don't object.

17 MR. SCHAEFFER: If it's illegible, we'll  
18 give you a cleaner copy.

19 CHAIRPERSON GRIFFITH: All right, ASCAP  
20 Exhibit 20X is admitted.

21 (The document referred to,  
22 having been previously marked

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1 for identification as ASCAP  
2 Exhibit No. 20 was received in  
3 evidence.)

4 BY MR. SCHAEFFER:

5 Q Have you read it?

6 A Oh yes, I'm well aware of this.

7 Q You say you're well aware of it and the  
8 document by and large speaks for itself. I take it  
9 these are a series of advertisements which NPR for the  
10 first time in 27 years is now engaging in. Is that a  
11 fair comment?

12 A Yeah, but it's a little more complicated  
13 than that also. This --

14 Q Tell us.

15 A This is quite frankly done through the  
16 support of the Ford Foundation. NPR, we feel very  
17 strongly, is probably the world's best kept secret.  
18 There is -- the only way people find out about NPR  
19 programming is by word of mouth or turning the radio  
20 dial to the lower end of the spectrum mandated by  
21 Congress for public radio and through the support of  
22 the Ford Foundation, we were able to initiate this

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1 effort to develop creatives to actually tell people  
2 where NPR is and how to find us. This entire campaign  
3 which I hope we can perpetuate is strictly done on  
4 barter.

5 Q What do you mean by barter?

6 A Trade with the national magazines that are  
7 featuring these advertisements in exchange for an on  
8 air underwriting credit on NPR.

9 Q So that what in effect is happening is  
10 Time, Harper's, Atlantic Monthly, Civilization and  
11 Worth are getting spots on NPR, on NPR national  
12 underwriting, I assume?

13 A That is correct.

14 Q In return for carrying this. Do you know  
15 if the practice of barter is engaged in in the  
16 commercial radio business?

17 A I do not.

18 Q Never heard about that before?

19 A I've heard of barter, but I don't have any  
20 specific evidence of whether it's done.

21 Q Is anybody in your capacity as chief  
22 operating officer of NPR ever said to you that you

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1 know we barter time frequently and barter  
2 announcements in the commercial radio programs?

3 A Nobody has ever said that to me, but I  
4 certainly wouldn't doubt that it's done.

5 Q Do you ever read any broadcasting journals  
6 other than those dealing with public broadcasting?

7 A I just read Current.

8 Q You only read Current?

9 A I'm just kidding.

10 (Laughter.)

11 Q Do you read nonpublic broadcasting  
12 material as well?

13 A Yes.

14 Q What are some of the nonpublic  
15 broadcasting periodicals that you read?

16 MR. RICH: In the trade?

17 BY MR. SCHAEFFER:

18 Q Yes, thank you.

19 A Beyond Broadcasting & Cable?

20 Q Yes. I didn't know Broadcasting & Cable  
21 was commercial.

22 A Well, that's one I read.

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1 Q Anything else?

2 A I've read a variety of information.

3 Q And you've never seen the reference to  
4 commercial radio bartering in any of those  
5 periodicals?

6 A I'm sure I've seen the reference. I've  
7 just never taken it to heart.

8 Q Okay. And certainly the fact that radio  
9 stations and the commercial field barter time had  
10 nothing, did not make any impression on you when you  
11 engaged in this activity with Time, Harper's, Atlantic  
12 Monthly, Civilization and Worth? Is that correct?

13 A It's the only way we felt that we could  
14 effectively promote NPR.

15 Q That's not the question I asked you. I  
16 asked you whether the fact that you now apparently you  
17 knew something about barter, whether that occupied any  
18 -- withdraw it.

19 I think you've testified you may have seen  
20 references to barter in commercial broadcasting in  
21 some of the periodicals you read or am I wrong about  
22 that? I'm sorry, if I am.

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1           A       I may have seen the reference to bartering  
2           in a variety of magazines, periodicals.

3           Q       And has it ever -- and are you testifying  
4           that when this program was conceived and ultimately  
5           implemented by NPR, weren't you aware that this was  
6           the kind of thing that commercial radio stations  
7           frequently do, namely barter their time for other  
8           considerations?

9           A       Actually, I don't think that was among the  
10          basics or the principles behind the conception of this  
11          plan. Our development officer for whom this idea came  
12          felt that it was important to develop a mechanism to  
13          gain exposure for NPR to attract people who wouldn't  
14          otherwise know about us to turn to the lower end of  
15          the radio dial.

16          Q       How much -- I'm sorry. I apologize.

17          A       And when she initiated this effort, I'm  
18          sure she would have preferred for the Ford Foundation  
19          to fund at such a level so we could have afforded to  
20          purchase spots in magazines or newspapers, but  
21          unfortunately that was not the case because of the  
22          expense.

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1 Q Well, it isn't going to cost you anything  
2 out of pocket to give the credits, is it, to these  
3 estimable periodicals?

4 A Well, there's a significant cost attached?

5 Q What is that?

6 A The cost is that an underwriting credit  
7 that we might have otherwise been able to sell for  
8 cash.

9 Q And with respect to the underwriting  
10 credit that you might otherwise have sold for cash,  
11 how many underwriting credits are you giving to these  
12 periodicals?

13 A I don't know the exact number.

14 Q Do you have any idea of what the punitive  
15 cost is, namely, is it like a million dollars worth of  
16 NPR time, a \$100,000, what's the dimension we're  
17 talking about here?

18 A I would estimate and this is just a guess  
19 that it's hundreds of thousands of dollars.

20 Q By the way does NPR incur marketing  
21 expense, NPR itself. I'm not talking about the public  
22 broadcasting industry at large, that's something else

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1 again. But NPR as an entity, does it have marketing  
2 expense?

3 A Marketing expense for selling our  
4 programs, yes.

5 Q And marketing expense in connection with  
6 its other activities, namely -- okay, marketing  
7 expense in connection with the selling of its  
8 programs. Approximately what was that in 1997, do you  
9 know?

10 A My best guess would be somewhere between  
11 100 and 250,000.

12 Q Does that include the barter we've talked  
13 about or is that a 1998 figure?

14 A That would be a 1998 figure and no, it  
15 does not include barter.

16 Q Have you ever engaged in barter before  
17 other than that which is described in Exhibit 20?

18 A Not that I'm aware of.

19 Q Next ask I put before the witness  
20 something called Guidelines for Underwriting of  
21 National Program Service Programs.

22 I think that will be ASCAP 21X.

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1 CHAIRPERSON GRIFFITH: It will be marked  
2 as Exhibit ASCAP 21X.

3 (The document referred to was  
4 marked for identification as  
5 ASCAP Exhibit No. 21X.)

6 (Pause.)

7 MR. RICH: No objection.

8 CHAIRPERSON GRIFFITH: Are you offering  
9 it, Mr. Schaeffer?

10 MR. SCHAEFFER: I am indeed.

11 CHAIRPERSON GRIFFITH: Received without  
12 objection.

13 (The document referred to,  
14 having been previously marked  
15 for identification as ASCAP  
16 Exhibit No. 21X was received in  
17 evidence.)

18 MR. RICH: Peter, you have the -- I'm  
19 ahead of myself.

20 MR. SCHAEFFER: Am I distracting you?

21 MR. RICH: Not at all, go ahead.

22 BY MR. SCHAEFFER:

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1 Q What do you have in front of you that  
2 you're going through?

3 A The underwriting guidelines.

4 Q Okay, that's fine. Obviously, you're  
5 familiar with these?

6 A Yes.

7 Q Do you have any particular role in  
8 connection with the implementation or conception of  
9 these guidelines?

10 A Very minimal.

11 Q Who has that responsibility at NPR?

12 A Our General Counsel Office, along with our  
13 development staff, Director, Vice President and the  
14 Board of NPR.

15 Q Do you have any understanding on the  
16 degree to which these guidelines are binding or not  
17 binding upon local stations carrying NPR programming  
18 and carrying its own programming, their own  
19 programming?

20 A They're binding upon the stations for the  
21 use of national underwriting credits provided by NPR.  
22 They are guidelines that we would hope that stations

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1 might use on a local level for their own underwriting  
2 efforts, but we don't have control over that.

3 Q Now with respect to the NPR programs that  
4 are carried on public radio stations, what sanctions  
5 are imposed upon those stations if they don't, if they  
6 haven't complied with these guidelines?

7 A Okay, I need you to clarify the question  
8 for me.

9 Q Please, I'd be glad to.

10 A Are these sanctions that are put upon the  
11 stations by the FCC with regard to the station  
12 carrying an underwriting credit which is inappropriate  
13 or are you talking about if they don't follow what we  
14 ask them to do.

15 Q Well, I assume, that's a fair question.  
16 There are some items in this, I'm sure, and I know  
17 that are FCC regulations and you don't have the writ  
18 of seizure so I assume you don't enforce the FCC  
19 regulations per se. The question though is if there  
20 is any violation of a guideline either a guideline  
21 that's in common with that of the FCC or your own  
22 guideline, what are the sanctions?

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1 MR. RICH: Could I ask through the Panel  
2 a clarification, whether Mr. Schaeffer is inquiring as  
3 to -- to use the word earlier you use the precatory  
4 part of these guidelines or the mandatory part of  
5 these guidelines?

6 MR. SCHAEFFER: Any part.

7 THE WITNESS: It's a very difficult  
8 question for me to answer.

9 BY MR. SCHAEFFER:

10 Q Tell me why.

11 A Perhaps it would be better addressed to  
12 our General Counsel Office. I mean we expect the  
13 stations to follow our guidelines in reading our  
14 credits and they have a responsibility to do so.  
15 Similarly it's a consultative process where there is  
16 station representation with our management to make  
17 sure this is done appropriately and if it comes to our  
18 attention that a station is not doing what it should  
19 be doing, then we certainly send notice or give fair  
20 warning. But in terms of what we do if a station  
21 continually violates, doesn't carry our credits or  
22 covers them, I would be very hard pressed to think of

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1 any instance when that has happened on a consistent  
2 basis where a notice hasn't taken care of the  
3 situation.

4 Q So as far as you're concerned you don't --  
5 you recall no case where a real sanction was imposed,  
6 maybe because it wasn't because sanctions haven't been  
7 deserved and these radio stations have been in  
8 compliance?

9 A I don't recall at this point any sanction,  
10 any such instance.

11 Q Do you recall that any particular stations  
12 over the years of your administration had been  
13 consistently called to your attention as a violator of  
14 the NPR program service, NPR guidelines?

15 A I'm not aware of anybody on a consistent  
16 basis.

17 Q Have there ever been any protests  
18 indicated to you about the guidelines being too rigid  
19 and being unfair?

20 A I guess my response to that is no, I don't  
21 recall any communication to us that the guidelines  
22 were too rigid or unfair. I'm just not aware of that

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1 language being used.

2 Q Would you put in front of the witness a  
3 document dated March 7, 1997 called Public  
4 Broadcasting Report. This would be 22X.

5 CHAIRPERSON GRIFFITH: It will be marked  
6 as ASCAP Exhibit 22X.

7 (The document referred to was  
8 marked for identification as  
9 ASCAP Exhibit No. 22X.)

10 BY MR. SCHAEFFER:

11 Q And it's just for identification for the  
12 moment.

13 (Pause.)

14 Why don't you look at or read to yourself?

15 (Pause.)

16 JUDGE GULIN: Just the first page of this?

17 MR. SCHAEFFER: I think the first page is  
18 the most relevant. I think the second page, first  
19 hand, but why don't we -- it's very hard to read  
20 because it's single spaced. I'm well aware of that.

21 BY MR. SCHAEFFER:

22 Q Let me ask a couple of questions about it.

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1 First of all, have you ever seen this before?

2 A I don't remember this specific article.  
3 I remember the instance.

4 Q By the way, just out of curiosity, is  
5 there, have you ever read Public Broadcasting Report  
6 or is that --

7 A Actually I have, yes.

8 Q That's a periodical generally used in your  
9 business. You say you remember this meeting on  
10 February 26 and 27 in Washington?

11 A Actually, I said I remember the article.

12 Q I'm sorry, I thought you said you  
13 remembered the meeting.

14 A I presume the February meeting was our  
15 Board meeting in February of last year.

16 Q And do you recall that there was any  
17 discussion at that meeting concerning the relaxation  
18 of national underwriting rules?

19 A I recall that in the membership committee  
20 which is one of the eight committees of our Board,  
21 this was a topic that was discussed. I did not attend  
22 that because I was in a different committee meeting at

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1 that particular time, but I'm aware that this  
2 discussion took place.

3 Q Did it come to your attention what the  
4 subject matter of that discussion was? Would you tell  
5 us?

6 A Well, the subject matter really related to  
7 the fact that the FCC after a number of years had  
8 relaxed its guidelines, I believe, to permit corporate  
9 underwriters to use their slogan within the  
10 underwriting statement. And in this particular  
11 instance, Snap-E-Tools or whatever the name of the  
12 company was, their slogan, even though it wasn't  
13 accepted and approved slogan crossed the line as being  
14 qualitative, promotional. So we created the  
15 controversy as to even though it's an accepted slogan  
16 is what it says appropriate for use on public radio.  
17 Indeed, more recently this year we had something  
18 similar with Time Magazine.

19 Q What was the issue in Time?

20 A Their accepted slogan which appears on the  
21 front page or the inside cover of Time Magazine says  
22 "the world's most intelligent magazine."

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1 Q And how was that resolved?

2 A We cannot use it.

3 Q With respect to this article and I don't  
4 know if it's true or not, you'll have to tell me, was  
5 there relaxation of NPR's rules in 1996, I guess it  
6 would be?

7 A We began to accept corporate slogans,  
8 corporate logos.

9 Q I see, so that was the relaxation that you  
10 understand?

11 A That's correct.

12 Q That's referred to. Obviously, it's not  
13 your statement.

14 Now, there also is a description which I'm  
15 going to ask you whether or not it came to your  
16 attention involving apparently something said by Ms.  
17 Bennett. Do you know Ms. Bennett, the General Manager  
18 of KWMU?

19 A Yes, I do.

20 Q And she is reported here as saying some  
21 stations don't even air some national underwriting  
22 spots and then goes on to say, apparently, all

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1 stations must carry all underwriting as called for in  
2 their contract, she said, before correcting herself  
3 with membership agreement, NPR promises its  
4 underwriters these spots will be aired, Bennett said,  
5 and if some stations choose not to air them, maybe  
6 they should be invited not to air NPR programming. Do  
7 you remember that?

8 A I don't remember the specific statement,  
9 but --

10 Q I mean the substance?

11 A Yes, the substance.

12 Q And was there a dispute -- withdraw it.  
13 Is it a fact that on occasions the stations ignore the  
14 national underwriting?

15 A No, I think it's a very different process  
16 than that. The stations are very quick to let us know  
17 if they feel that something crosses the line. We try  
18 to be scrupulous and indeed our standards are probably  
19 at a higher level than our members stations because  
20 if, in fact, we put on an underwriting credit which is  
21 inappropriate or improper, it's the station or the  
22 local market that's in jeopardy, not NPR. So we have

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1 to be very careful how we do it and what we say.

2 Therefore, if we propose a national  
3 underwriting some language in the national  
4 underwriting credit, that a station feels is  
5 inappropriate, normally they'll come tell us and it  
6 becomes a dialogue, then our General Counsel's office  
7 has to make a decision whether it's something that we  
8 will insist that the stations carry or if it's  
9 something that we should look at again because maybe  
10 the station is right in bringing this to our  
11 attention.

12 It's a dialogue and I think very, very  
13 seldom have stations -- has a particular station  
14 chosen unilaterally not to air something without us  
15 knowing about it and realizing that there might be a  
16 problem.

17 Q But there have been, as you say, a number  
18 of occasions when stations -- well, withdraw it. It's  
19 not going to change anything.

20 Going on, you may not have read it yet on  
21 the next page and I'm just going to -- it's sort of a  
22 lead in, it says -- this article says "close to

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1 station manager's pocketbooks was issues of dues,  
2 status" -- I guess that's Bill Davis. Somebody, I  
3 assume known to you -- is he a station person also?

4 A He was -- he is the head of WUNC at the  
5 University of North Carolina.

6 Q Mr. Davis apparently said key issue is  
7 that licensees must report all data for all stations  
8 regardless of what they aired, so that NPR can better  
9 assess due rates. Was there in this board meeting a  
10 discussion of the dues that would be paid and the  
11 better ways or worse ways of assessing dues on behalf  
12 of NPR?

13 A I would venture to guess, Mr Schaeffer,  
14 that there isn't a Board meeting that passes when  
15 there isn't a discussion of dues and programming fees.

16 Q I see.

17 A Mr. Davis was involved in his membership  
18 committee which he chaired at that point in time, was  
19 involved in a year-long dialogue and analysis with the  
20 stations to see if another dues formula might be more  
21 appropriate or applicable than the one based upon  
22 total station revenue. That is what this is

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1       referencing.

2               Q       Okay. And ultimately, I take it, from  
3       what I think you testified earlier was the dues are  
4       still an on-going discussion at NPR?

5               A       And will be in perpetuity.

6               Q       I see. Okay. Now a little further down,  
7       again referring to Davis, it says Davis headed  
8       subcommittee on associate and auxiliary membership  
9       categories, identified 259 associates, linked to 96  
10      full NPR members with two thirds of associates full  
11      repeaters. Associates are forbidden to receive CSGs.  
12      Auxiliary stations don't meet NPR requirements for  
13      staff numbers, budget, etcetera and pay only 25  
14      percent for dues.

15              Now I assume this has something to do with  
16      what you testified a little earlier, unfortunately  
17      over my objection about other memberships. Is that  
18      correct?

19              A       That is correct.

20              Q       All right, so maybe you can explain and  
21      I'm sorry to burden you with this, but I'd like to  
22      find out what it means.

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1                   What does it mean to say that there are  
2                   259 associates linked to 96 full NPR members and with  
3                   two thirds of associates full repeaters?

4                   A       That means that of the 259 associates,  
5                   those stations are getting from the 1996 full NPR  
6                   members their programming, either repeating it or  
7                   translating it, depending upon where they are and in  
8                   what -- it's like for the lack of a better way of  
9                   putting it, it is like a station, Wisconsin Public  
10                  Radio is a group of stations with two primary stations  
11                  in the Madison, Wisconsin area that serve another  
12                  dozen or 15 stations throughout the state of  
13                  Wisconsin.

14                  Q       So that the other stations, that is the  
15                  non-Madison, Wisconsin station which is close to my  
16                  heart since I come from there, I went there for a  
17                  while, the non-Madison station just simply get the  
18                  full programming, present them to their own local  
19                  communities without any additional production costs or  
20                  anything along those lines. They just repeat it, is  
21                  that correct?

22                  A       It's not cut and dry. It varies by

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1 community, but in most cases they will take what is  
2 provided by that -- the home base station and in some  
3 cases they will even abet that program with something  
4 done on the local level, but most cases they're taking  
5 the feed from that station.

6 Q I see. And then it says associates --  
7 which I assume are these kinds of people, stations --  
8 are forbidden to receive CSGs. What's CSGs?

9 A Community service grant. That's one of  
10 the two types of grants that the Corporation for  
11 Public Broadcasting gives to local stations, gives to  
12 public radio stations.

13 Q Do you have an understanding as why they  
14 don't receive those grants?

15 A No. Specifically I don't.

16 Q Is there any policy reason that you're  
17 aware of for why they wouldn't be subsidized just as  
18 anybody else would?

19 A I presume it relates to the Corporation  
20 for Public Broadcasting's own rules and regulations.

21 Q Is there any, as far as you're aware, has  
22 there been in recent years while you've been

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1 associated with NPR a movement to eliminate certain  
2 stations that don't reach certain staffing levels?

3 MR. RICH: Object to the form. I  
4 certainly don't understand the meaning of the word  
5 "eliminate"?

6 THE WITNESS: Yes.

7 BY MR. SCHAEFFER:

8 Q Fine. Do these repeaters or whatever  
9 they're called, the associate members get Corporation  
10 for Public Broadcasting grants?

11 A Inmost cases I believe they do, yes.

12 Q And in your experience in the last three  
13 years while you've been with NPR, isn't it a fact that  
14 there has been a movement to eliminate these stations  
15 as recipients of those grants?

16 A No, I would not put it that way at all.

17 Q Well, how would you put it?

18 A There has been a broad discussion,  
19 frankly, stemming from the Corporation for Public  
20 Broadcasting, examining a number of the issues that  
21 relate to these small stations and their ability to  
22 receive grants.

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1           One of the issues and it's a significant  
2           one is technology. Some stations feel that since they  
3           have extremely limited resources that by reducing the  
4           number of paid full-time staff or full-time equipment  
5           I think is the term used in this, that they could more  
6           efficiently replace a person with some technology  
7           which would enable them to repeat programming. In  
8           other words, after a certain hour you flip a switch  
9           and the national programming feed takes over.

10           CPB has, I think, as its basis you must be  
11           five full-time equivalents to receive community  
12           service grant or to receive grants to be eligible for  
13           CPB funding, so the discussion of the dialogue has  
14           been should that number of full-time equivalents be  
15           changed relevant to the advent of new technologies.

16           Q       Are you familiar with KWMU(FM), KDHX (FM)  
17           and WSIE(FM)?

18           A       The only one off the top of my head that  
19           I'm familiar with is KWMU which I believe is Ms.  
20           Bennett's station in St. Louis.

21           Q       Are you aware that it has been suggested  
22           that their grants be substantially reduced by CPB?

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1 A No, I'm not.

2 Q Excuse me a second. Are you aware that in  
3 1996 the Corporation for Public Broadcasting put a  
4 number of public broadcasting stations on notice that  
5 the criteria to be eligible for funding would change?

6 A Yes, I am.

7 Q And what happened? Was the criteria for  
8 funding changed?

9 A This actually led to the development of  
10 the Future Fund which we alluded to earlier. There  
11 were some stations that according to two standards and  
12 I can't remember specifically what the standards were.  
13 I think one related to listener sensitive income and  
14 the other to size of audience.

15 There were a number of stations that by  
16 these criteria established by the Corporation for  
17 Public Broadcasting weren't performing. When I say  
18 weren't performing, they just felt that the station  
19 wasn't reaching -- it was like broadcasting to its  
20 best friends, rather than to the public community. So  
21 they established this criteria and in an effort to get  
22 these stations to perform more effectively, Future

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1 Fund was created to assist the stations in performing  
2 more efficiently.

3 Q Incidentally, does NPR for its membership  
4 require stations to have a certain level of staffing?

5 A I believe NPR membership mirrors the  
6 regulations established by the Corporation for Public  
7 Broadcasting.

8 Q And what is that?

9 A I believe it's five full time equivalents  
10 in terms of staffing.

11 Q So if you don't have five employees, you  
12 can't be an NPR affiliate or member?

13 A That's correct. .

14 Q What other qualifications are there to be  
15 an NPR member?

16 A There is a certain number of hours that  
17 you need to be on the air on a weekly basis. I think  
18 there's some sort of expectation with regard to  
19 payment of employees. I'm not aware of all the  
20 specifics, but the primary ones are the number of  
21 full-time staff and the number of hours you broadcast  
22 per week.

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1 Q So NPR tries to make a line at which  
2 stations which are too small can't become NPR members,  
3 is that the idea?

4 A I don't think it relates to smallness as  
5 much as it relates to professionalism and the ability  
6 to serve your community.

7 Q Has there been any suggestion by some of  
8 the NPR members that they would like to see the  
9 associates eliminated because there's competition in  
10 broadcasting the same shows or the same programs?

11 A Yes. Again, it's not specifically as you  
12 phrased it. There is some concern with a station and  
13 I'll use my Madison, Wisconsin -- there's a concern  
14 that a station in Madison might put a repeater into  
15 the Chicago suburbs where there is another local  
16 station broadcasting. There's concern that then you  
17 have one public station competing with another. And  
18 even though they're on different frequencies. So that  
19 has been the topic for discussion, but there's been no  
20 resolution to that.

21 Q Why would that be a bad thing if All  
22 Things Considered were produced by a lot of different

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1 stations in concurrent jurisdictions. You're not a  
2 profit operation. What's the difference?

3 A The concern expressed by the stations I  
4 don't think have anything to do with profit. I think  
5 it more relates to fairness and equity. A station in  
6 Chicago market that might be paying NPR hundreds of  
7 thousands of dollars and provides Morning Editing and  
8 All Things Considered has a legitimate concern with  
9 another station plopping a stick or a repeater into  
10 that same market area that is paying significantly  
11 less to NPR based upon its total station revenue, in  
12 other words, a repeater station. It's more of a  
13 station versus station concern.

14 There are many, many markets around this  
15 country, L.A. and San Francisco and Washington, those  
16 are fine examples, where there's a multiplicity of NPR  
17 stations providing at some hours similar programming.  
18 But in general, most of the formats and stations,  
19 multiple stations in similar market are complementary  
20 formats. You have a classical station, a jazz  
21 station.

22 Q Thank you. I'm going to ask that Exhibit

1 312 be put before the Arbitrators and the witness.  
2 The status of this, I think, it's so far been agreed  
3 to be admissible subject to a qualification that's  
4 disagreed to, namely the Public Broadcasters side.  
5 It's only admissible as illustrative or authority for  
6 Mr. Unmacht, but not on its own. Is that fair?

7 MR. STEIN: That's correct.

8 MR. SCHAEFFER: And I'm not offering the  
9 other exhibit in evidence. I think it's just  
10 cluttering the record. That's the previous one that  
11 I did.

12 CHAIRPERSON GRIFFITH: All right, ASCAP  
13 Exhibit 312X is --

14 MR. SCHAEFFER: It's 312. It continues to  
15 be 312. There's no point in remarking it.

16 (The document referred to was  
17 marked for identification as  
18 ASCAP Exhibit No. 312.)

19 JUDGE GULIN: I thought it was withdrawn.

20 MR. SCHAEFFER: So far only to the extent  
21 --

22 CHAIRPERSON GRIFFITH: Only to the extent

1 that it's illustrative of what?

2 MR. SCHAEFFER: I didn't say it.

3 MR. STEIN: It's a document which was  
4 purportedly relied upon by Dr. -- by Mr. Unmacht, but  
5 not for the truth of the matter is asserted.

6 MR. SCHAEFFER: It's our position having  
7 been used by Mr. Unmacht, he and himself is the  
8 sponsoring witness for it to go into evidence and we,  
9 of course, disagree. I would move it in evidence now  
10 or I'm going to ask some questions about that anyway.  
11 So why don't I wait until I ask the questions. Then  
12 I'll move it in. Maybe that will reassure them about  
13 the objection.

14 BY MR. SCHAEFFER:

15 Q Will you look at 312? It's this big fat  
16 book and I don't expect you to read it off the stand.

17 Have you ever seen this before?

18 A Yes, I have.

19 Q Will you tell us what it is?

20 A I think, if I remember correctly, and I  
21 haven't looked at it in a long, long time. It's a  
22 guidebook that was developed through a grant from the

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1 Corporation for Public Broadcasting geared to help  
2 advise stations on how to do things a little bit  
3 better in soliciting corporate support.

4 Q Now the document itself at page Roman  
5 numeral XIII says that copies were distributed to each  
6 CPB qualified radio station. Is that your  
7 understanding as well?

8 A That is indeed what it says, yes.

9 Q Do you have any reason to dispute that?

10 A No.

11 Q In fact, are you aware that this is still  
12 on the bibliography of the web page of CPB? It's  
13 offered to members?

14 A I'm not aware of that but I don't doubt  
15 that to be fact.

16 Q This is a document that circulated, as far  
17 as you know still on your constituency, isn't it?

18 A I believe so.

19 Q I'm going to offer it into evidence now.  
20 I don't think there's any qualifier.

21 CHAIRPERSON GRIFFITH: It will be received  
22 as ASCAP Exhibit 312.

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1 MR. RICH: There is an objection. I'm not  
2 aware that anything that was just testified to  
3 alleviates the objection. This is a multi-hundred  
4 page document. I have no idea the specifics for which  
5 it's being offered. It contains purported data,  
6 purported strategies. It was not authored by us. Not  
7 authored by any of the stations. It was authored by  
8 a third party. It's a classic example where I haven't  
9 the foggiest idea of what it is that Mr. Schaeffer  
10 proposes is relevant about this document other than to  
11 use it for whatever, we will learn, in post-trial  
12 briefing, I suppose, the snippet he wants to take out  
13 of it.

14 It seems to me that among other things the  
15 purpose of 351.45 on documentary evidence indicates an  
16 intention that when you have a document of such length  
17 that a burden be placed on the proffering party to  
18 identify relevant portions of it. So we have some  
19 idea of what it's about.

20 I haven't a clue of what to do with a  
21 document like this and therefore our objection stands.

22 MR. SCHAEFFER: Mr. Unmacht testified at

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1 considerable length, I thought, and I know he did --  
2 not thought -- I know he did as to what this document  
3 indicates about the solicitation of what he described  
4 as people functionally equivalent to advertisers by  
5 the radio industry. Indeed, he made some admiring  
6 comments that this was a handbook for that kind of  
7 solicitation. It comes under the auspices, we've  
8 already heard of the CPB. It's distributed to the  
9 local members and the reason it's offered is because  
10 it's all relevant. The reason it's all relevant, I'm  
11 trying to prove here, I think, I may not succeed, that  
12 will be up to you gentlemen, but I'm trying to prove  
13 that the way the public broadcasting and in this case  
14 public radio does business is functionally equivalent  
15 in many respects to the commercial radio industry and  
16 it's therefore appropriate to use the commercial rates  
17 as a method of figuring out what the rates should be.  
18 It's not 100 percent, but it should a take off from  
19 that. And that's why I'm offering it and I think it's  
20 clearly relevant and I think anybody who reads this  
21 document and I can't believe Mr. Rich, if he tells me  
22 he doesn't, I believe it, but I'm sure somebody at

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1 Weil, Gotshal must have read this to see exactly what  
2 it is. At least, all you have to do is read the first  
3 five pages and you can see it's a guide book to  
4 soliciting underwriters from the first page to the  
5 last page.

6 MR. RICH: As Mr. Weiss said when he was  
7 with us, had we literally read every piece of paper  
8 proffered by ASCAP we would still be in the back room  
9 reading.

10 We did not read every page of this because  
11 we didn't feel it was our burden to. There's no  
12 testimony in evidence, whether from this witness  
13 presently here or Mr. Unmacht or anybody else, as to  
14 what use, if any, a radio station makes of this  
15 document. This is a piece of paper that apparently  
16 has been sent out. We have no idea what, if any, use  
17 is actually made to it and nobody competent to draw  
18 that linkage to a proffered document written by a  
19 woman named Linda K. Liebold who I haven't seen in  
20 this room, don't know anything about, don't know her  
21 expertise or qualifications. We have no idea what use  
22 this has been made of in the industry. Mr. Schaeffer

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1 will undoubtedly use this document in its post-trial  
2 briefing as an alleged manual for, I suppose or  
3 template for how quote the public radio industry goes  
4 about soliciting business and corporate support.

5 There's nothing in the record that would  
6 suggest as much.

7 JUDGE DREYFUS: Would this witness know  
8 the extent in which this document had been used by the  
9 radio stations themselves?

10 MR. RICH: I haven't heard Mr. Schaeffer  
11 ask that question.

12 MR. SCHAEFFER: I'll ask him that  
13 question, but he's already said that he knows --

14 CHAIRPERSON GRIFFITH: Wait just a minute,  
15 Mr. Schaeffer. Mr. Kleinberg had his hand waving.

16 MR. KLEINBERG: Can I just say, I do want  
17 to note on the acknowledgement paid which is little i  
18 page of the document there is a thank you to the  
19 Corporation for Public Broadcasting for fully funding  
20 the business and corporate support success project.  
21 And then it goes on to a very special thank you to the  
22 following public radio development professionals who

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1 took the time to share their experience and expertise  
2 by writing articles for this guide. They then  
3 identified various people affiliated -- affiliations  
4 indicating various stations and also two people that  
5 I've seen with NPR in Washington, D.C. If one just  
6 casually peruses the document you will see it as a  
7 collection of articles written by these people and  
8 that is what it is. So I think in terms of its  
9 authenticity and its appearance and everything else,  
10 it is exactly what the witness testified it was.

11 MR. SCHAEFFER: Moreover, he just said  
12 it's still be distributed to the stations. Well, it's  
13 obvious what it's for. It says what it's for.

14 MR. RICH: If I may, Your Honors, there  
15 is, in my simple mind, a distinction between the  
16 document that may be shipped to 600 or more stations  
17 and the issue of what use, if any, to which it may be  
18 put about which I've heard no questioning of this  
19 witness in response to Mr. Dreyfus's suggestion.

20 JUDGE DREYFUS: Also, what's the date of  
21 the document?

22 MR. SCHAEFFER: 1994.

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1 JUDGE DREYFUS: 1994?

2 MR. SCHAEFFER: Yes.

3 MR. KLEINBERG: Your Honor, the date of  
4 the document is 1995. It refers to a study that was  
5 done in 1994.

6 MR. SCHAEFFER: I'm sorry. Thank you.

7 MR. KLEINBERG: If you look at various  
8 pages like Roman 259, it's copyrighted at the  
9 University of Southern California, Los Angeles, 1995,  
10 I mean throughout there are references to the time  
11 period of 1995. It refers on the face of the study --

12 MR. SCHAEFFER: Let me ask a couple of  
13 questions I thought I had elicited this before.

14 BY MR. SCHAEFFER:

15 Q This is still being distributed on request  
16 to the radio stations, isn't it?

17 A I don't know. I answered before, you  
18 asked me if it was on the web site at CPB. I have no  
19 reason to believe it's not.

20 Q I thought you had testified before, the  
21 record will say, I asked you isn't this something  
22 that's distributed even now and still in print to the

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1 CPB qualified station and I thought you had said yes.  
2 I may be wrong.

3 A That's not a question that I was asked and  
4 I didn't respond to that because I don't know.

5 JUDGE GULIN: He may have said something  
6 along the lines of "I assume so" if you recall the  
7 question.

8 MR. SCHAEFFER: I have to say CPB is a  
9 party to the proceeding. This is a document prepared  
10 under CPB's auspices.

11 We've already had Unmacht testify about  
12 it. I can't subpoena Ms. Liebold. The thing is a  
13 guide, obviously, to solicitation. It's up to them to  
14 say it's not being used. I can't prove its use or not  
15 use. How could I?

16 MR. RICH: Your Honors, I didn't know we  
17 had a guilty until proven innocent presumption in this  
18 proceeding. That's pretty much tantamount to what I'm  
19 hearing from Mr. Schaeffer.

20 MR. SCHAEFFER: I'll tell you what, Mr.  
21 Rich, why don't you bring one of your stations in and  
22 I'll ask them if they're using it.

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1 MR. RICH: I'll address my comments to the  
2 Panel.

3 MR. KLEINBERG: May I ask a question in  
4 the nature of Voir Dire of the witness?

5 CHAIRPERSON GRIFFITH: Yes.

6 VOIR DIRE

7 BY MR. KLEINBERG:

8 Q Do you know a person by the name of  
9 Jacqueline Nixon who may have occupied the position of  
10 Associate Director of Audience Research at NPR?

11 A Yes, I do.

12 Q And you testified about that, are you  
13 aware that Ms. Nixon wrote an article appearing at  
14 page Roman 3 --

15 MR. SCHAEFFER: Well, she's got an  
16 acknowledgement of the page.

17 BY MR. KLEINBERG:

18 Q Her article is entitled "Presenting and  
19 Prospecting: A Guide to Research for Effective  
20 Underwriting."

21 Is she still with NPR?

22 A She is still with NPR as our Director of

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1 Audience Research.

2 JUDGE DREYFUS: Does she report to you?

3 THE WITNESS: She does not report to me,  
4 no.

5 JUDGE DREYFUS: Indirectly? I mean is she  
6 in one organization that reports to you? You're the  
7 CLO, right?

8 THE WITNESS: No, she reports to the CEO  
9 directly.

10 JUDGE DREYFUS: Directly?

11 THE WITNESS: Yes.

12 BY MR. KLEINBERG:

13 Q And do you know an individual by the name  
14 of Lenore Tuttle-Wilkas?

15 A I knew Ms. Wilkas. She's no longer with  
16 NPR.

17 Q She was until when?

18 A She left NPR soon after I arrived.

19 Q Was she the Associate Director for  
20 Development at NPR?

21 A Yes, she was.

22 Q And that area was for getting funds,

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1 corporate underwriting, development, that's what that  
2 office was about?

3 A Yes.

4 MR. SCHAEFFER: I offer it again.

5 JUDGE GULIN: Let me just offer the  
6 following comment. I think what I'm hearing, there's  
7 really no serious argument as to the genuineness of  
8 this document. I don't think there's any serious  
9 argument that this is a document produced by CPB and  
10 at least made available to the radio stations. There  
11 is some controversy as to whether it was actually used  
12 by the radio stations, but Mr. Rich, is it at least  
13 probative as to the mindset of CPB?

14 MR. RICH: I don't believe there's any  
15 such testimony. All we know is that it was funded by  
16 CPB. I don't know that Mr. Unmacht certainly wouldn't  
17 know what was CPB's motivation. The Panel is welcomed  
18 to inquire of Mr. Schaeffer or anyone of this witness,  
19 whether he knows CPB's motivation and most  
20 importantly, we don't know to what use, if any, it's  
21 been put.

22 I'm not challenging the authenticity of

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1 the document as a document showing relevance, sent out  
2 to the industry, but that seems to me scarcely to  
3 permit the conclusion or the judgment which ASCAP  
4 apparently would lead to which is this is a template  
5 for the industry in going out and soliciting money.

6 We don't know if it's been used and for  
7 what extent it's been used for that purpose.

8 MR. SCHAEFFER: The web site at CPB has  
9 been agreed to be in evidence in this case. There's  
10 no dispute about that. This is listed in the web site  
11 as being available to the stations today. That's how  
12 we got --

13 CHAIRPERSON GRIFFITH: The web site has  
14 been agreed to be?

15 MR. SCHAEFFER: Yes.

16 MR. RICH: I don't know what that means.

17 MR. SCHAEFFER: You would concede whatever  
18 the exhibit is, Exhibit 313 is admissible, Mr. Rich.

19 Exhibit 313 has a bibliography attached to  
20 it stating what is available to the stations that are  
21 affiliated with CPB. That's this. It says so.

22 MR. RICH: Al right. We have tried in

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1 good faith and very carefully and I really find it  
2 difficult when Mr. Schaeffer attempts to misportray  
3 things of this nature. We've looked at every document  
4 proffered by Mr. Grajeda, all hundreds of them and  
5 where on a web site or otherwise, generated on a piece  
6 of paper or on a telephone slip for that matter, there  
7 is CPB or PBS or NPR authorship. We have said we  
8 would withdraw our objection to the admissability of  
9 all of those documents. Where, however, in a limited  
10 number of cases and 312 is one of them there's a  
11 document authored principally at least by nonparties  
12 to this proceeding or anybody associated with them,  
13 then we have no basis for knowing or certainly it's  
14 not in the nature of an admission. We have no basis  
15 for knowing the reliability of it and again at the  
16 risk of repeating, we have nothing in evidence to show  
17 the manner, if at all, in which this document has been  
18 used by the stations themselves.

19 MR. SCHAEFFER: Two points. They're  
20 paying for something. They must be doing it for a  
21 reason. Secondly, all of the articles are written by  
22 people we've identified as with stations that are

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1 being represented by these people in this proceeding.

2 CHAIRPERSON GRIFFITH: All right.

3 MR. SCHAEFFER: Of every single one of the  
4 articles, sir, is written by somebody -- maybe there's  
5 three or four exceptions, virtually every article is  
6 from somebody from one of the qualified stations.

7 CHAIRPERSON GRIFFITH: All right, let me  
8 just inquire about a logistics matter.

9 MR. SCHAEFFER: Sure.

10 CHAIRPERSON GRIFFITH: How much longer do  
11 you intend to cross examine?

12 MR. SCHAEFFER: I have another 45 minutes.

13 CHAIRPERSON GRIFFITH: And then Mr.  
14 Kleinberg, you're going to cross?

15 MR. KLEINBERG: I don't have very much.  
16 I would say under a half hour.

17 CHAIRPERSON GRIFFITH: You're going to  
18 Redirect?

19 MR. RICH: As necessary.

20 JUDGE GULIN: So that's already up to two  
21 hours plus.

22 MR. SCHAEFFER: Yes.

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1 JUDGE GULIN: So it's unlikely we can  
2 finish this witness.

3 MR. SCHAEFFER: Yes.

4 JUDGE GULIN: I think rather to attempt to  
5 be expedient, why don't we adjourn. We will meet and  
6 make a decision with respect to this. I think we've  
7 heard you both on it and advise you first thing in the  
8 morning. And we'll pick it up right from there.

9 MR. RICH: Thank you.

10 MR. SCHAEFFER: Thank you. 9:30 or 10?

11 CHAIRPERSON GRIFFITH: What's more  
12 convenient for you?

13 THE WITNESS: It really doesn't matter.  
14 Either is fine. It's up to you.

15 CHAIRPERSON GRIFFITH: You're a big help.

16 THE WITNESS: If it was my choice I'd  
17 probably go for 9:30.

18 CHAIRPERSON GRIFFITH: 9:30 it is.  
19 Take care.

20 (Whereupon, at 4:55 p.m., the hearing was  
21 recessed to reconvene tomorrow, Wednesday, April 1,  
22 1998 at 9:30 a.m.)

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CERTIFICATE

This is to certify that the foregoing transcript in  
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                              Noncommercial Educational  
                              Broadcasting Compulsory License,  
                              Docket No. 96-6 CARP NCBRA

Before:                   Library of Congress  
                              Copyright Arbitration Royalty Panel

Date:                     March 31, 1998

Place:                    Washington, DC

represents the full and complete proceedings of the  
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